IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

IN RE:	)	
	)	
CYNTHIA F. TONEY,	)	
a/k/a CYNTHIA F. PASSMORE,	)	
	)	
Plaintiff,	)	CASE NUMBER: 2:06-CV-949
	)	
vs.	)	
	)	
MEDICAL DATA SYSTEMS, INC.,	)	
d/b/a MEDICAL REVENUE SERVICES, INC.,	)	
	)	
Defendant.	)	

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The Plaintiff provides this summary of undisputed facts along with her argument and analysis in support of her motion for summary judgment. The Plaintiff seeks summary judgment based on the content of the Defendant's PL1 debt collection letter. A copy of the PL1 debt collection letter is attached hereto as "Exhibit 1." Throughout the content of this brief, the PL1 debt collection letter may be referred to as the "PL1," the "dun," or the "Defendant's debt collection letter." In addition to the PL1 letter, the Plaintiff also relies on the trial testimony of Gary Ball, the Defendant's corporate representative. The Plaintiff further relies on the deposition testimony of Gary Ball and the deposition testimony of various Defendant's employee debt collectors. The trial testimony transcript occurred in the civil action styled James Cambron v. Medical Data Systems, Inc., d/b/a Medical Revenue Services, Adversary Proceeding number 06-01057, and Wendy Cambron v. Medical Data Systems, Inc., d/b/a Medical Revenue Services,

Adversary Proceeding number 06-01058. The Chapter 7 Trustee, William C. Carn, III, was substituted as Plaintiff in both Adversary Proceedings. The style of the case is now Carn v. Medical Data Systems, Inc., d/b/a Medical Revenue Services, Civil Action numbers 1:07-cv-369 and 1:07-cv-370.

In Cambron, Judge William R. Sawyer submitted a proposed report and recommendation. The Defendant objected to the proposed report and recommendation of liability. The Report and Recommendation was subsequently reviewed de novo by the Honorable W. Harold Albritton in Carn. The trial testimony refers to the testimony given by Gary Ball in the United States Bankruptcy Court for the Middle District of Alabama. A copy of the relevant trial testimony is attached hereto as "Exhibit 2," and is referred to as "trial transcript." The relevant portions of Gary Ball's deposition are attached hereto as "Exhibit 3," and are referred to as "Ball deposition." The individual Defendant's debt collector employees were are all deposed on April 6, 2007. Those debt collectors are hereinafter referred to as "Barbara Thomas, Richard (Larry) Heath, Michelle Peacock, Shawn Smith, Denise Bobelak, and Tammy Schaffer." The relevant portions of Barbara Thomas' deposition are attached hereto as "Exhibit 4;" the relevant portions of Larry Heath's deposition are attached hereto as "Exhibit 5;" the relevant portions of Michelle Peacock's deposition are attached hereto as "Exhibit 6;" the relevant portions of Shawn Smith's deposition are attached hereto as "Exhibit 7;" the relevant portions of Denise Bobelak's deposition are attached hereto as "Exhibit 8;" and, the relevant portions of Tammy Schaffer's deposition are attached hereto as "Exhibit 9". The Plaintiff's "face sheet" is attached hereto as "Exhibit 10."

UNDISPUTED FACTS

1. The Plaintiff filed the instant complaint on October 20, 2006.

2. The Plaintiff's complaint alleges that the Defendant's PL1 debt collection letter violates various portions of the FDCPA.

3. The Defendant is a debt collector as that term is defined under the FDCPA, 15 U.S.C. § 1692a(6). See Defendant's responses to Plaintiff's Requests for Admissions numbers 3, 4, and 5, wherein the Defendant admitted that it was a debt collector. A copy of the Defendant's responses are attached hereto as "Exhibit 11."

4. The Defendant was attempting to collect a medical debt allegedly owed by the Plaintiff to Medical Center Enterprise.

5. The debt to Medical Center Enterprise is a consumer debt as that term is defined under the FDCPA, 15 U.S.C. § 1692a(3) & (5). See Exhibit 11, Defendant's responses to Plaintiff's Request for Admission number 6, wherein the Defendant admits the debt is a consumer debt.

6. The Defendant admits that it transmitted the PL1 debt collection letter, to the Plaintiff on April 19, 2006. See Exhibit 11, Defendant's responses to Plaintiff's Request for Admission number 8, wherein the Defendant admits that it transmitted the PL1 debt collection letter on April 19, 2006.

7. The Plaintiff's complaint alleges that the following portion of the Defendant's PL1 debt collection letter violates the FDCPA:

> "Medical Revenue Service is a collection agency, retained to represent the below named creditor. Since you have failed to pay

this obligation in full, we now must determine your ability to repay this debt. The information we may be seeking, if available, to determine what further collection effort to take is:

1.) Real estate ownership/equity
2.) Personal property assets
3.) Savings, checking balances
4.) Your source of income
5.) Automobile ownership
6.) Verification of employment"

Exhibit 1.

ARGUMENT AND ANALYSIS

The FDCPA is a federal law passed "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). To accomplish its purposes, the FDCPA expressly prohibits debt collectors from engaging in numerous specific practices. 15 U.S.C. §§1692c, -d, -e, -f & -g.

The FDCPA is remedial in nature and designed to encourage consumers and attorneys to enforce compliance with the FDCPA by acting as private attorneys general. Martinez v. Law Offices of David J. Stern, P.A. (In re Martinez), 266 B.R. 523, 541 (Bankr. D. Fla. 2001) ("This provision is intended to encourage consumers and their attorneys to act as 'private attorneys general' in order to enforce the FDCPA. (citing Baker v. G.C. Services Corp., 677 F.2d 775, 780 (9th Cir. 1982)); Whatley v. Universal Collection Bureau, Inc., 525 F. Supp. 1204, 1206 (N.D. Ga. 1981)"); see also Yelvington v. Buckner, 1984 U.S. Dist. LEXIS 24890, 1-2 (D. Ga. 1984) ("The purpose of this section is to deter debt collection practices violative of this Act through the use of private enforcement ... (citations omitted)").

The FDCPA is a strict liability statute. Proof of one violation is sufficient to support summary judgment for a plaintiff. Clark v. Capital Credit & Collection Services, Inc., 2006 U.S. App. LEXIS 21594, *29-*30 (9th Cir. 8/24/2006); see also Russell v. Equifax A.R.S., 74 F.3d 30, 33 (2d Cir. 1996) ("Because the Act imposes strict liability, a consumer need not show intentional conduct by the debt collector to be entitled to damages."); Hartman v. Meridian Financial Services, Inc., 191 F. Supp. 2d 1031, 1046-1047 (W.D. Wis. 2002) ("One false or misleading statement in a collection letter renders the entire communication false or misleading and constitutes one violation."); see also, Cacace v. Lucas, 775 F. Supp. 502, 505 (D. Conn. 1990); Traverso v. Sharinn, 1989 U.S. Dist. LEXIS 19100, *4 (D. Conn. Sept. 15, 1989); Picht v. Jon R. Hawks, Ltd., 236 F.3d 446, 451 (8th Cir. 2001); Bentley v. Great Lakes Collection Bureau, 6 F.3d 60, 62 (2nd Cir. 1993).

In light of the strict liability standard, Ms. Toney need not prove what the Defendant intended to convey in the PL1 letter. The only inquiry concerns the actual content of the PL1 letter as viewed through the eyes of the "least sophisticated consumer."[1] Furthermore, the Defendant's intent is irrelevant to this summary judgment inquiry if such intent is not readily apparent from the face of the PL1 collection letter. As evidenced by the trial testimony and deposition testimony, the Defendant's intent is rather vague and hazy. Under the FDCPA, there are no unimportant violations. Bentley at 63 (no non-actionable violations of FDCPA); Taylor v. Perrin, Landry, deLaunay & Durand, 103 F.3d 1232, 1234 (5th Cir. 1997) (failure "to comply with any provision of the FDCPA" leads to liability). Further, no proof of deception or actual

[1]Jeter v. Credit Bureau, 760 F.2d 1168, 1172-1173 (11th Cir. 1985)

damages is required to obtain statutory remedies. Baker v. G.C. Services Corp., 677 F.2d 775, 780 (9th Cir. 1982).

LEGAL STANDARDS

A. Summary judgment should be granted where there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law

A court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). A material fact is one "that might affect the outcome of the suit under the governing law. . . ." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id. The court must resolve all ambiguities and draw all reasonable inferences in favor the non-moving party. Provenz v. Miller, 102 F.3d 1478, 1483 (9th Cir. 1996).

A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." Celotex, 477 U.S. at 323-24. Summary judgment is appropriate against a party who "fails to make a showing sufficient to establish the existence of a element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322. The moving party need not disprove matters on which the opponent has the burden of proof at trial. Id. at 317. The party opposing summary judgment "may not rest upon the mere allegations or denials of [the party's] pleadings, but . . . must set forth specific facts showing that there is a

genuine issue for trial." Fed. R. Civ. P. 56(e); Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 585-88, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

B. FDCPA general liability standards

A violation of the Fair Debt Collection Practices Act,[2] occurs when: (1) the plaintiff has been the object of collection activity arising from a consumer debt; (2) the defendant collecting the "debt" is a "debt collector" as defined in the Act; and (3) the defendant has engaged in any act or omission in violation of the prohibitions or requirements of the Act. Kolker v. Duke City Collection Agency, 750 F. Supp. 468, 469 (D.N.M. 1990); Riveria v. MAB Collections, Inc., 682 F. Supp. 174, 175-76 (W.D.N.Y. 1988); Withers v. Eveland, 988 F. Supp. 942, 945 (E.D. Va. 1997); Whatley v. Universal Collection Bureau, Inc., 525 F. Supp. 1204, 1206 (N.D. Ga. 1981).

1) Medical debts are defined as consumer debts.

The Defendant, in its capacity as a debt collector, attempted to collect a medical debt. Medical debts are widely acknowledged as consumer debts. *E.g.,* Pipiles v. Credit Bureau, Inc., 886 F.2d 22 (2d Cir. 1989); Healy v. Jzanus Ltd., 2002 WL 31654571 (E.D.N.Y. Nov. 20, 2002); Campion v. Credit Bureau Services, Inc., 2000 U.S. Dist. LEXIS 20233 (E.D. Wash., Sept. 19, 2000). In its Request for Admissions, the Defendant, in response to admission request number six, admitted that the alleged debt to Medical Center Enterprise was a consumer debt. Defendant's Response to Plaintiff's Request for Admissions, Exhibit 11, Response 6.

2) The Defendant is a debt collector.

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[2]In her complaint, plaintiff is seeking relief pursuant to the Fair Debt Collection Practice Act, 15 U.S.C. §1692, *et seq.*, [FDCPA]

By its own admission, the Defendant is "a debt collector within the meaning of the term under the Fair Debt Collection Practices Act." Id. at Responses 3, 4, and 5.

3) Defendant mailed the PL1 debt collection letter to the Plaintiff on April 19, 2006.

At issue in this case is the language in the Defendant's form debt collection letter identified as the PL1 letter. A copy of that letter is attached hereto as Plaintiff's Exhibit 1. In response to the Plaintiff's Request for Admissions, the Defendant admits to mailing the letter on April 19, 2007. Plaintiff's Exhibit 11, Response 8.

4) In assessing liability under 15 U.S.C. §§ 1692e & e(10), the court views the offending language through the eyes of the "least sophisticated consumer."[3]

The PL1 offending language states as follows:

> Medical Revenue Service is a collection agency, retained to represent the below named creditor. Since you have failed to pay this obligation in full, we now must determine your ability to repay this debt. The information we may be seeking, if available, to determine what further collection effort to take is:
>
> 1.) Real estate ownership/equity
> 2.) Personal property assets
> 3.) Savings, checking balances
> 4.) Your source of income
> 5.) Automobile ownership
> 6.) Verification of employment

5) Courts use an objective standard in reviewing offending language.

In determining whether the Defendant's collection letter violates the FDCPA, the Court uses an objective standard based on the "least sophisticated consumer." Jeter v. Credit Bureau, 760 F.2d 1168, 1172-1173 (11th Cir. 1985); see also Bentley v. Great Lakes Collection Bureau, 6 F.3d 60, 62 (2d Cir. 1993) ("We apply an objective test based on the understanding of the "least

[3]Jeter v. Credit Bureau, 760 F.2d 1168, 1172-1173 (11th Cir. 1985).

sophisticated consumer" in determining whether a collection letter violates section 1692e.") "The basic purpose of the least-sophisticated consumer standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd." Clomon v. Jackson, 988 F.2d 1314, 1318 (2d Cir. 1993).

C. The PL1 letter violates 15 U.S.C. § 1692e & e(10) with false deceptive representations.

1) PL1 letter is capable of multiple interpretations.

The PL1 letter is both explicit and implicit in its message. As to the six categories of assets, every conceivable item of property is mentioned. Nothing is left to the imagination. The listed assets are: 1.) Real estate ownership/equity; 2.) Personal property assets; 3.) Savings, checking balances; 4.) Your source of income; 5.) Automobile ownership; and, 6.) Verification of employment. The letter creates much confusion in stating its intent to gather information and "determine what further collection effort to take." Specifically, the Defendant seeks information pertaining to the listed assets.

The preface to the specific assets, however, creates much confusion. A reasonable person might wonder how the Defendant intends to gain this information and who will be contacted. The reasonable person, however, is not the standard. Instead, the "least sophisticated consumer" is told that the six categories of assets may be reviewed. In determining "what further collection effort to take," the who, what, when, where, why and how are left to imagination. The initial thought may be, will the Defendant take the property without the consumer's knowledge? Or, will the employer find out? Will the consumer's wages be subject to garnishment? Will the Defendant empty out the bank account? Will the Defendant take the consumer's automobile? What about the poor consumer on Social Security? Is it subject to attachment? The PL1 letter,

unfortunately, creates more questions than it does answers. As such, the consumer is never informed that the Defendant only intended to call and inquire about a payment plan. That explanation, however, is never mentioned.

To define deception, courts crafted a multiple interpretation definition as tending to deceive. Wilson v. Quadramed Corp., 225 F.3d 350, 354 (3d Cir. 2000) (" a collection letter 'is deceptive when it can be reasonably read to have two or more different meanings, one of which is inaccurate.'" (citation omitted)); Russell v. Equifax A.R.S., 74 F.3d 30, 35 (2d Cir. 1996) ("In addition, a collection notice is deceptive when it can be reasonably read to have two or more different meanings, one of which is inaccurate.") The court in Russell goes on to hold that "the initial collection notice . . . was reasonably susceptible to an inaccurate reading [and] was also deceptive within the meaning of the Act." Id. See also Clomon v. Jackson, 988 F.2d 1314, 1319 (2d Cir. 1993) ("Courts have held that collection notices can be deceptive if they are open to more than one reasonable interpretation, at least one of which is inaccurate.").

Summary judgement is appropriate here as the Defendant's PL1 debt collection letter contains very real possibilities of multiple interpretations. Dutton v. Wolhar, 809 F. Supp. 1130, 1141 (D. Del. 1992) ("When analyzed in light of the least sophisticated debtor standard, the fact that this language is susceptible to two plausible interpretations leads this Court to find in favor of plaintiff. The least sophisticated debtor is not charged with gleaning the more subtle of the two interpretations."). In Dutton, the Plaintiffs moved for summary judgment based on language in a debt collector's dun. The court analyzed the phrase "once judgment is obtained" and determined the language was false on its face. The court reasoned that "[s]uch a debtor would

believe this language represents that judgment would inevitably be obtained against him when in fact such an outcome would not be inevitable." Id.

In comparison to the case at bar, the Defendant warns of information it may be seeking "to determine what further collection to take . . . ." Deposition testimony, however, reveals that there is one and only one further collection effort and that is to telephone the Plaintiff. [Cambron/Carn, Trial Tr. 18:23-24] ("[a]ll of our business is done on the phone, not by letters, for all intents and purposes."); [Trial Tr. 19:2-3] ("[t]he vast, vast majority of the money that we collect is money that we collect by talking to the guarantor."). When questioned about "further collection efforts," the Defendant's representative testified that "we would continue making phone calls, . . . we will continue to make phone calls. . . we are just going to keep on trying to call them." [Trial Tr. 28:21-23, 29:5-6.] To clarify, Plaintiff's counsel asked the Defendant's representative: "Your further collection efforts, from what you're testifying to, simply means more calls, more letters?" The Defendant's representative responded: "[y]es unless something extenuating was to happen, yeah." [Trial Tr. 29:7-9.] The Defendant's corporate representative was unwavering in his responses. Contacting a potential debtor on the telephone was the primary mechanism for discovering these assets. Ball Dep. 71:14-23, 72: 1-5. Only in rare occasions did the Defendant pull a credit report because it cost too much. Trial Tr. 47:15-20. The expense Ball refers to is an .18¢ credit report inquiry. Ball Dep. 21:20-23.

By definition, the phrase, "to determine what further collection effort to take" along with the list of assets contains multiple possibilities. The reasonable consumer, let alone the "lease sophisticated consumer," may assume that assets are at risk. It is even reasonable to believe that the Defendant will make contact with third parties to talk about the recipient. How else can the

Defendant obtain source of income information or savings and checking balances without benefit of a third party contact? It is beyond reasonableness that the phrase can only be interpreted to mean that the Defendant will call and discuss the assets as a means for working out payment arrangements. The court in Dutton held that "[w]hen measured by the least sophisticated standard, Defendants' use of the phrase "once judgment is obtained" falsely represents Defendants' ability to secure judgment . . . ." Id. The court correctly granted summary judgment in the Plaintiff's favor as to the 1692e(10) claim. Id.

While courts recognize that the "FDCPA does not extend to every bizarre or idiosyncratic interpretation," the Plaintiff's allegations are far from bizarre or idiosyncratic. Rosa v. Gaynor, 784 F. Supp. 1 (D. Conn. 1989). If the PL1 describes a host of assets where the Defendant "may be seeking [information] . . . to determine what further collection effort to take . . . ," the "least sophisticated consumer," believes that the assets may be in real jeopardy; not to mention the embarrassment associated with making contact with third parties to obtain this information. The Defendant would have this Honorable Court believe that the list of assets will be examined only when the Defendant telephones the Plaintiff. The offending language, however, never mentions the Defendant's intent to telephone the Plaintiff to question her about the assets. During Ball's deposition, he was asked why the consumer was not informed of this simple meaning. That is, why doesn't the letter plainly state that the Defendant will call? Ball simply stated that the letter was authored by his partner over twenty years ago and he (Ball) never asked. Ball Dep. 81:19-23, 82:1-22.

Without benefit of the corporate representative's testimony, the statement regarding further collection efforts and the mention of assets leads one to believe that the Defendant will

conduct some form of asset search. Even the simplest of imaginations could fathom multiple possibilities, none of which involve the Defendant telephoning the Plaintiff and simply asking about the assets. To the contrary, the PL1 letter, by its very terms, elicits the most basic responses of fear, panic or embarrassment over the coming doom. In reality, the letter probably is meant to invoke a phone call from the recipient to telephone the Defendant to avoid the loss of property or avoid third party contact.

2) There are no factual disputes concerning Defendant's collection tactics.

To be sure, there is no doubt as to the Defendant's collection procedure. That is, the Defendant attempts to get the debtor on the telephone and discuss payment arrangements. The Defendant, in very rare instances, performs a very limited asset search only when the individual collector believes a debtor is being untruthful. Ball Dep. 91:11-16, 92:5-18. Even then, the collector may go no further. Ball Dep. 89:21-23. The Defendant's representative testified that if a debtor tells them they have nothing, then collection stops. Ball Dep. 87:11-23, 88:1-11.

In summary, the Defendant telephones the debtor and attempts to obtain payment in full or set up a payment plan. If the debtor does not answer, or they cannot speak with the debtor, nothing further occurs.

3) The content of the PL1 letter stands in sharp contrast to actual collection tactics.

The letter informs the Plaintiff of the Defendant's intent to gather information pertaining to six categories of assets. The reasonable assumption is that the letter applies to the Plaintiff's assets. In fact, item number four states "your source of income." On this issue, the letter is very personal. Nowhere is there a mention of using the assets as a means to assist in formulating a payment plan. In response to discovery, the Defendant provided the Plaintiff's "face sheet." A

debtor "face sheet" is "a print-out from [the Defendant's] computer collection system that gives the information [the Defendant has] stored on the account. It's what shows [debtor information] for a collector when he's working the account." Ball Dep. 9:16-20. The Plaintiff's "face sheet" is attached hereto as Exhibit 10. The contact between Defendant's collectors and Plaintiff reveals that there was no discussion of assets during the conversations. The contacts only mention a payment plan. At best, the sole reason for discussing assets during a telephone conversation was to formulate a payment plan. The collectors, if they actually talk to the debtor, attempt to establish payment plans. Smith Dep. 40:11-25; Bobelak Dep. 43:10-12; Peacock Dep. 17:15-18, 30:20-24. The true intent of the letter is important only in the sense that it shows that the Defendant has no intent to take any actions regarding the assets. The letter itself conjures up implied threats of asset seizure. The Defendant's representative and the collectors all echoed the same response. That is, if there was a discussion about assets, the information would be contained in the "face sheet."[4]

4) The Defendant representative's testimony reveals that the PL1 letter contains a false representation.

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[4] If information was gathered pertaining to real estate equity, the information would be contained either on the debtor face sheet or in the collector's head. Ball Dep. 61:22, 23, 62:1-6. Collectors are asked to put notations of the relevant points of the conversation in the software which is contained on the debtor face sheet. Ball Dep. 62:11-12. The Defendant's policy is that relevant information gained during a telephone conversation with a debtor is supposed to be [put input into] the collection software system which will then show up on the face sheet. Ball Dep. 63:1-3. Information regarding personal property assets discussed with a debtor during a collection call must be documented on the debtor's face sheet. Schaffer Dep. 28:15-18, 22-25; 29:1-7. Information pertaining to assets would be noted in the debtor's face sheet / Defendant's computer system. Heath Dep. 17:3-25; 18:1-21. Ownership of property would be noted in the computer system. Shawn Smith Dep. 26:20-25. All pertinent information obtained during a collection call is noted in the computer and is not stored anywhere other than the computer. Bobelak Dep. 31:7-25. Pertinent information is typed by the debt collector and stored in the collection software / face sheet. Bobelak Dep. 32:8-11.

The PL1 letter states that the Defendant will "determine what further collection effort to take. . . ." The letter, however, never mentions the Defendant will telephone the Plaintiff. The phrase "what further collection effort to take" coupled with the list of assets implies multiple possibilities. But, as the Defendant's representative testified, the Defendant only utilizes one collection effort and that is to telephone the Plaintiff. Trial Tr. 18:23-19:3. If the Plaintiff has no phone, does not answer, or avoids the Defendant, no other collection effort is initiated. That is to say, the Defendant only attempts telephone calls and nothing more. On this simple issue, the PL1 letter is false. The telephone call is a condition precedent to "further collection effort." The PL1 letter continues in its falsity because further collection effort is only defined as an initial telephone call. Moreover, as a secondary debt collector, the Defendant does not even return the account to the hospital for collection efforts that may be initiated by the hospital. Trial Tr. 12:7-24.

5) The individual debt collectors never search assets. At best, the collectors only seek a monthly payment plan.

Under 15 U.S.C. § 1692e, "Debt collectors may not make false claims, period." Randolph v. IMBS, Inc., 368 F.3d 726, 730 (7th Cir. 2004) (citing Russell v. Equifax A.R.S., 74 F.3d 30, 33 (2d Cir. 1996)); Clomon v. Jackson, 988 F.2d 1314, 1320 (2d Cir. 1993). The Defendant's PL1 letter utilizes false representations in attempting to collect the debt. It states "we now must determine your ability to repay this debt. The information we may be seeking, if available, to determine what further collection effort to take is: [six categories of assets listed]." The collectors, however, testified that they did not search for assets, did not inquire about the listed assets, or utilized only a small portion of the assets to assist in a payment plan when they

reached the debtor by telephone. Peacock Dep. 31:12-32:6, 43:2-5; Bobelak Dep. 46:1-16; Smith Dep. 22:1-2. (e.g., using checking account to ask about check by phone).

The FTC commentary provides that a "debt collector may not state or imply that he or any third party may take any action unless such action is legal and there is a reasonable likelihood, at the time the statement is made, that such action will be taken (emphasis added). 53 Fed. Reg. at 50106. Under this charge, the Defendant must have a "reasonable likelihood" of taking such action as to every debtor that it sends the PL1 letter. In any given year, the Defendant mailed out 1.8 million PL1 letters. Trial Tr. 15:16-23. To the contrary, the only possibility of such asset review or inquiry only occurred when the individual debt collector reached the debtor on the telephone. Ball Dep. 81:19-82:3. Under the standard set forth by the FTC, the Defendant, in each instance of sending out the PL1 letter (1.8 million), must have a reasonable likelihood of seeking the asset information listed in the PL1 letter. If the potential debtor is reached on the telephone, each of the Defendant's debt collectors deposed in connection with this case, indicated that they either did not ask about the listed assets or only asked limited questions for the sole purpose of determining a payment plan. Peacock Dep. 31:12-32:6, 43:2-5; Bobelak Dep. 46:1-16; Smith Dep. 22:1-2.

The FTC commentary further states that if the debt collector has reason to know there are facts that make the action unlikely in the particular case, a statement that the action was possible would be misleading. 53 Fed. Reg. at 50106. By its very terms, the PL1 letter is misleading. According to the Defendant's own policies, first and foremost, the Defendant must reach the Plaintiff on the telephone. Trial Tr. 18:23-19:3. Next, the Defendant, at best, only asks limited questions in an attempt to obtain a payment plan. In the instant case, the Plaintiff's "face sheet"

contains no discussion whatsoever about assets. See "face sheet", Exhibit 10. Instead, the discussion centers only around a $50 per month payment. Oddly enough, the collector never asked about the "source of income." Exhibit 10. As the individual debt collectors testified, they know little if anything about discovering assets and even then, the collectors are only concerned with a payment plan. Peacock Dep. 31:12-32:6, 43:2-5; Bobelak Dep. 46:1-16; Smith Dep. 22:1-2. This argument, of course, goes to the intent of the PL1 letter as stated by the corporate representative. This Honorable Court should not lose sight of the actual content of the letter. Nowhere does the letter even mention a phone call from the Defendant. Instead, the only mention of a telephone call is contained in the next to last paragraph of the PL1 letter where the Plaintiff is invited to initiate the phone call.[5]

By its own admission, the Defendant rarely even questions a potential consumer about the six categories of assets. During trial in the Carn v. Medical Data, on cross examination by the Defendant's counsel, the following exchange occurred:

> Q. But in every case you are not going to have to go through all of [these six items]; are you?
>
> A. No, absolutely not.

Trial Tr. 37:7-9.

Apparently, unaware of the FTC commentary, Defendant is perfectly content to perform some type of asset inquiry only in very limited circumstances. Nonetheless, the Supreme Court finds the FTC Commentary particularly persuasive. Chevron, U.S.A. v. Natural Resources

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[5]"If you have any questions, you may contact an account representative at the above listed phone number."

Defense Council, Inc., 467 U.S. 837, 844 (1984); see also Hawthorne v. Mac Adjustment, 140 F.3d 1367, 1372, n.2 (11th Cir. 1998). The Federal Trade Commission (FTC) is the primary enforcement agency of the FDCPA under the Act. 15 U.S.C. §§ 1692l(a), 1692m. Congress specifically charged the FTC with enforcement and administration of the FDCPA. See 15 U.S.C. § 1692l. The FTC has developed a Staff Commentary (hereinafter referred to as "the Commentary") on the FDCPA. 53 Fed. Reg. 50097-50110 (Dec. 13, 1988). Although the FTC's construction of the FDCPA is not binding on the courts, because the FTC is entrusted with administering the FDCPA, its interpretation should be accorded considerable weight. See Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).

6) The Defendant's use of the phrase "may" does not relieve it of liability.

The Defendant would have this Honorable Court believe that its use of the phrase "may" offers it a safe passage through the FDCPA liability waters. The Defendant overlooks, however, the clear mandate of "least sophisticated consumer." In attempting to define "may," even great legal minds wrestle with the definition focusing more on the context than the actual definition itself. United States v. Lexington Mill & Elevator Co., 34 S. Ct. 337, 340 (U.S. 1914) (In citing Webster's Dictionary, the Court defined "may" as "'an auxiliary verb, qualifying the meaning of another verb, by expressing ability, . . ., contingency or liability, or possibility or probability.'"); United States v. Cook, 432 F.2d 1093, 1098 (7th Cir. 1970) ("While it is true in construction of statutes, and presumably also in the construction of Federal rules, that the word 'may' as opposed to 'shall' is indicative of discretion or a choice between two or more alternatives, the context in which the word appears must be the controlling factor.")

If reasonable legal minds grapple with the phrase "may," how is the non-lawyer supposed to interpret the PL1 meaning? What is meant when the Defendant says "[t]he information we may be seeking, if available, to determine what further collection effort to take . . ."? There is nothing facially clear by this phrase especially when six categories of assets follow. Another court wrestled with the seemingly benign phrase "legal review process" and found the dun letter violated the FDCPA. Drennan v. Van Ru Credit Corp., 950 F. Supp. 858, 860 (D. Ill. 1996) ("Unsophisticated consumers to whom [the debt collector] addresses such communications do not open their mail with Strunk and White's *The Elements of Style* at their elbows (for that matter, who does?)"). The court, in Drennan, posed the question, "[j]ust what is meant by "the legal review process," a term that is puzzling even to anyone schooled in the law. . . ." Id. The same should be asked here? Just what is meant by "the information we may be seeking, if available, to determine what further collection effort to take . . . ."? Coupled with the host of assets, the dun is rendered beyond comprehension. All sorts of possibilities arise. Maybe the Defendant wanted to leave it to the recipient's imagination.

Defendant contends that the use of the word "may" makes the implication non-deceptive. The Second Circuit in Bentley disagreed. Bentley v. Great Lakes Collection Bureau, 6 F.3d 60, 62 (2d Cir. 1993). There, the collection agency used the subjunctive "were our client" and such tenuous phrases as "could result", "might . . . include", "where applicable", "were not satisfied", "might be collected by attachment", "garnishment may also be an available remedy." The use of the word "may" does not make the letter non-deceptive to the "least sophisticated consumer;" to the contrary, as illustrated by Bentley, that usage reinforces the deception. Id. Pursuant to the FTC Staff Commentary, the assertion that something might happen cannot be made unless it

usually does happen. Brown v. Card Serv. Ctr., 464 F.3d 450, 455 (3d Cir. 2006); cf. United States v. National Financial Services, Inc., 98 F.3d 131 (4th Cir. 1996) (where "literally millions of notices were sent" and only 15 suits were ever filed, the Court found that creditors did not intend to pursue the course of action threatened.)

D. The Defendant violated 15 U.S.C. § 1692e(5) threatening action it could not legally take and threatening an action it did not intend to take.

In accordance with 15 U.S.C. § 1692e(5), a collection agency may not threaten to take any act which it does not intend to take, is not able to take, or which is illegal. 15 U.S.C. § 1692e(5); Bentley v. Great Lakes Collection Bureau, Inc., 6 F.3d 60 (2d Cir. 1993); Even the threat that a third party might litigate is also inappropriate for a collection agency. Pipiles v. Credit Bureau of Lockport, Inc., 886 F.2d 22, 25-26 (2d Cir. 1989) (only action then contemplated was attempt at telephone contact); Bentley v. Great Lakes Collection Bureau, 6 F.3d 60, 26 (2d Cir. 1993) (implied legal action was imminent when not in fact the case); United States v. National Financial Services, Inc., 98 F.3d 131, 138 (4th Cir. 1996) (false implication of legal action).

The Defendant's PL1 form debt collection letter constitutes an implied "threat" within the meaning of 15 U.S.C 1692e(5). While the FDCPA does not provide a definition of "threat," courts have applied the plain meaning of that term. In Ferguson v. Credit Mgmt. Control, Inc., 140 F. Supp. 2d 1293 (M.D. Fla. 2001), that court defined "threat" as "a communicated intent to inflict . . . loss on . . . another's property . . . [or] an indication of an approaching menace. Id. at 1299, (quoting Black's Law Dictionary 1489-90 (7th ed. 1999)). The court in Ferguson cited numerous examples of threatening communications including "threats to sue, threats to garnish wages and/or seize assets, threats to contact the debtor's neighbors and/or employer, threats to

subject the debtor to additional costs for collecting the debt, threats to investigate the debtor's employment, and threats to transfer the account to an attorney for assessment." Id. at 1299-1300.

In the PL1 letter, the threat is implied based on the reference to the six categories of assets, coupled with the failure to define "further collection efforts." The PL1 letter easily meets the definition of "threat" as well as the examples of threatening communications set forth in Ferguson. Id. Besides an implied threat, the question arises as to whether the threatened action could "legally be taken" or was "intended to be taken." 15 U.S.C. § 1692e(5). The plain language of the PL1 letter states that the "information" regarding the listed assets would be used to determine "further collection effort." The statement "further collection effort" leads to the implication that MDS intends to act upon one of the listed assets in order to collect on the debt it alleges the Plaintiff owes.

Looking first at whether the threatened action could be "legally taken," seizures and garnishments are only available to the Defendant as post-judgment remedies against a Plaintiff. The Defendant, however, at no point obtained a judgment against any of the Plaintiffs. While it is clear the Defendant could not legally take action against the Plaintiffs, it is equally as obvious that the Defendant never intended to take such action. In his capacity as the Defendant's corporate representative, Gary Ball previously testified that the Defendant does not file legal actions in Alabama. Trial Tr. of Pro. 18:4-6. Therefore, there will never be a time when the Defendant is entitled to seize or garnish the assets listed in the form debt collection letter. Because the Defendant has not obtained a judgment against the Plaintiff, the Defendant has no legal right to the listed assets. The listing of the specified assets is false, misleading and deceptive in that the language leads the "least sophisticated consumer" to believe that the listed

assets are at risk. Jeter at 1172-1173. The Defendant violated 15 U.S.C § 1692e(5) by threatening to take an action that it could not legally take.

Based upon the testimony of Medical Data employees, it is also clear that the Defendant did not intent to take the threatened action. Quite simply, the Defendant did not intend to act upon any of these assets. The only action the Defendant ever intended to take, and in fact the only action the Defendant EVER takes is to continue calling the debtor. Ball Dep. 37:20-38:8, 71:14-72:5. Defendant did not even seek information regarding these assets when it called the Plaintiff. Despite speaking with the Plaintiff on several occasions, the Plaintiff's "face sheet" reveals that the Plaintiff was never questioned about any of the six assets. In fact, the Plaintiff wanted to set up a payment plan, yet the Defendant's collector never asked for the Plaintiff's source of income.

A "Debtor Face Sheet" is a printout from the Defendant's computer collection system that contains information regarding that account. Ball Dep. 9:16-19. Larry Heath is a collection supervisor for the Defendant. Heath Dep. 9:16-18, April 6, 2007. Mr. Heath stated that entering information on the computer is something collectors are trained to do (21:3-6), and that he would enter information he learned regarding a debtors assets in the computer. 21:16-21. More specifically, he would have noted information on the "face sheet" if he spoke with a debtor regarding automobile ownership (17:22-25), real estate ownership (18:1-3), checking accounts (18: 5-13), personal property assets (18:14-17), or additional sources of income (18:18-21).

The Plaintiff's "face sheet" is clear in that none of the Defendant's collectors questioned the Plaintiff regarding the assets listed on the PL1 letter. This is surprising because it is not

common practice for the collector to ask debtors about these assets. Peacock Dep. 31:12-32:6, 43:2-5; Bobelak Dep. 46:1-16; Smith Dep. 22:1-2.

Defendant's corporate representative testified under oath in Carn/Cambron that gathering information about the listed assets are "things that we would normally do when we get a hold of someone on the telephone, and those are the standard questions that the collector is asked to ask when they talk to them...." Trial Tr. 24:17-20.

However, Denise Bobelak, the debt collector for MDS who worked on Plaintiff's account, stated she does not ask debtors about real estate. Bobelak Dep. 42:23-25, April 6, 2007. She further stated that she only asks about automobiles when setting up a payment plan. Id. at 44: 13-17. The only discussion of checking accounts occurs when she accepts a check over the phone. Id. at 43:13-15. She does not ask about either savings accounts or other personal property assets. Id. at 43:16-22. Of course, the PL1 letter is contradictory because it first threatens to gather information regarding checking balances, but later informs the consumer we also accept "check by telephone." She also stated she only asks about other listed assets in order to set up payment plans. Id. at 46:1-16.

Other debt collectors working for MDS echoed Bobelak's position. Shawn Smith stated that he does not ask about assets. Shawn Smith Dep. 22:1-2, April 6, 2007. Specifically, he testified he would not have asked about automobiles, real estate, or personal property. Id. at 24:18-25:2. Smith would only ask about a checking account in order to take a payment check over the telephone. Id. at 25:19-21. Further, he would not ask about a savings account. Id. at 25:22-25. Smith goes so far as to say he was never trained to search for assets aside from asking

if the debtor had a checking account. Id. at 27:1-3, 34:4-15, 35:1-3. Unlike Ms. Bobelak, Mr. Smith never even asked about assets when working out payment plans. Id. at 40:22-25, 41:1-3.

Barbara Thomas, another debt collector employed by the Defendant, stated she never asked debtors if they owned real estate (Id. at 26:23-25), an automobile (Id. at 27:1-3), a savings account (Id. at 27:4-6) or other personal assets (Id. at 27:7-9). Even while working a payment plan, she might ask about an auto payment (Id. at 28:5-6). She also stated she would not ask if additional real estate was owned (Id. at 31:10-21).

Ms. Thomas went on to explain that she felt that it is unimportant if real estate or personal property assets are owned by the debtor. 32:4-15. Also, she never asks about checking or savings account balances. Id. at 32:19-25. When asked about her training as a debt collector, she stated that she never received training regarding the discovery of assets or auto ownership. Id. at 34:16-19. This includes training to locate any assets or even pull a debtor's credit report. Id. at 34:22-35:22. She went on to state that she would never ask about checking account, savings account, or auto ownership because such matters are private. Id. at 41:25-42:25.

Although the Defendant's corporate representative believes the collectors are trained to ask about these assets on every call, it seems as though the collectors were never clued into the requirement. Indeed, it seems impossible for a collector to ask about all six categories of assets when each collector must make 120 telephone calls a day. Ball Dep. 62:13-17; Heath Dep. 16:8-13. Of the collectors deposed, Michelle Peacock stated that she had been trained to search for assets. Peacock Dep. 25:5-7, April 6, 2007. This training included contacting clerks of county courts to determine property ownership. Id. at 25:9-12. She goes on to state that she will only contact a county clerk in the event that the debtor owed more than $500. Id. at 28:4-20, 29:2-7.

Furthermore, she only contacts a county clerk when two other factors are present. Id. at 29:25-30:1. Those factors are "gainful full-time employment" (Id. at 30:2), and the debtor's refusal to set up a "reasonable payment arrangement" (Id. at 30:2-3). Ms. Peacock stated unequivocally that "[t]hose three must be present to prompt me to even think about it." Id. at 30:7-8. Any other training related to assets was merely "part of reviewing income versus expenses" for payment plan purposes. Id. at 31:12-32:6, 43:2-5.

Given the inconsistency of the Defendant's asset discovery training, or lack of such training, it is readily apparent that the Defendant never intended to discuss the assets listed in its PL1 letter with debtors. In the instant case, despite three contacts, the collectors did not evidence an intent to discuss the Plaintiff's assets. According to the Plaintiff's "face sheet," the Defendant's representatives spoke with the Plaintiff three times, never mentioning or gathering any information regarding assets. Obviously, this information would have been available through the Plaintiff, but the Defendant did not attempt to elicit such data. As such, the Defendant violated 15 U.S.C § 1692e(5) by threatening to take an act it simply never intended to undertake.

E. Collateral Estoppel

1) Prior litigation against Defendant based on PL1 letter

On April 18, 2006, James Cambron initiated an adversary proceeding against the Defendant, in the United States Bankruptcy Court based on the identical language of the PL1 letter. The lawsuit sought redress under 15 U.S.C. §§ 1692e; e(5) and e(10). Concurrent with the James Cambron Adversary Proceeding, Wendy Cambron also filed a Complaint in the Bankruptcy Court asserting the identical issues as James Cambron. Ultimately, the Trustee,

William C. Carn, III, intervened as Plaintiff in both Adversary Proceedings. Both Complaints were consolidated and tried to conclusion on March 15, 2007, before the Honorable William R. Sawyer. See Adversary Case Numbers 06-1057 & 06-105. On April 5, 2007, Judge Sawyer entered a Report and Recommendation finding liability against the Defendant for violating the FDCPA. The Report and Recommendations are attached hereto as "Exhibit 12." The Defendant timely objected to the finding of liability and the matter was reviewed de novo by the United States District Court, Middle District of Alabama, pursuant to Rule 9033. Fed R. Bankr. Pro.

On December 4, 2007, the Honorable Harold Albritton entered a "Memorandum Opinion and Order," attached hereto as "Exhibit 13," in the consolidated action of Carn v. Medical Data. In prefacing the issue before the court, Judge Albritton stated that "[t]he sole issue decided today is whether this language violates the Fair Debt Collection Practices Act ("FDCPA"), which prohibits, inter alia, the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt."" See Exhibit 13 at 3, quoting 15 U.S.C. 1692(e).

In addressing preliminary issues, the District Court found that the "least sophisticated consumer" standard is applied when "determining 'deception' under the FDCPA". Order at 4. The "least sophisticated consumer" standard is not applied when determining threats of unintended action under e(5). Id. The District Court also found that violations of e(5) and e(10) "warrant independent analysis under different standards." Order at 7.

Looking first to the e(5) violation, the Judge Albritton concluded that "the language in MDS's debt collection letter implied that, due to Plaintiff's failure to "pay this obligation in full," MDS would now begin seeking available information to determine which specific assets to go after." The Court went on to state that the PL1 letter "violates § 1692e(5) precisely because

MDS suggested that investigation into available sources in order to locate assets would be undertaken, and that collection efforts against assets would be taken . . . when MDS had no intention of doing so." The District court further stated that "the defendant's letter impliedly threatened to investigate the debtor's employment, contact others to find assets, garnish wages or seize assets, or take further collection efforts other than contacting the debtors, if they did not pay the debts, none of which it had any intention of doing."

The District Court then addressed the e(10) violation, finding that the Defendants PL1 letter was deceptive and therefore violated e(10). The Court summarized that "the language of the letter would still lead 'the least sophisticated consumer' to believe that their assets were endangered due to some type of impending collection action. This deception alone constitutes a violation of e(10) under the strict liability of the FDCPA." Order at 14.

Given the Court's findings upon its de novo review of the case, the Court found that the Defendant violated sections 1692e(5) and e(10) of the FDCPA. Based upon those findings, the District Court adopted the Report and Recommendation of the Bankruptcy Court and entered a final judgment against the Defendant.

2) The Defendant is collaterally estopped from re-trying the issues pertaining to the PL1 debt collection letter.

The doctrine of collateral estoppel bars the Defendant from re-litigating the issue of whether its form debt collection letter is false, deceptive or misleading to the "least sophisticated consumer." See Sims v. Morris, 185 B.R. 939 (Bankr. N.D. Ga. 1994) ("Under the doctrine of collateral estoppel or issue preclusion, a party may be barred from re litigating an issue actually and necessarily litigated and decided in a prior action.")

To successfully invoke collateral estoppel, a party must demonstrate that: (1) the issue at stake in a pending action is identical to the one involved in the prior litigation; (2) the issue must have been actually litigated in the prior suit; (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the action; and, (4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding. See In re McWhorter, 887 F.2d 1564 (11th Cir. 1989) (citation omitted).

In the instant case, the issue at stake is identical to the one involved in the Carn/Cambron litigation: Does the Defendant's PL1 form debt collection letter violate the FDCPA? The language employed by the Defendant in each and every one of its PL1 letters is nearly identical. Trial Tr. 16:1-22. The language in question was also the basis of the rulings made by the Bankruptcy Court and the District Court in Carn/Cambron. Id. The only difference between the instant case and the issues in Carn/Cambron involves an additional claim under 15 U.S.C. § 1692e(4) which was not litigated in the Carn matter.

The section 1692e(5) & e(10) claims, however, were previously litigated in Bankruptcy Court and reviewed de novo by the District Court. After the District Court review, Judge Albritton entered a final judgment holding that the Defendant's PL1 form debt collection letter violated the FDCPA. The determination of whether the Defendant's PL1 letter violated sections 1692e(5) & e(10) was not only "a critical and necessary part of the judgment" it was the lone issues in those cases. The Defendant had a "full and fair opportunity to litigate the issues" and to fully brief the issues on review before the District Court. The Defendant was fully represented at

trial in the Bankruptcy Court and fully represented during the de novo review process in District Court.

Given that the issues at stake in the instant case are identical to the ones involved in Carn, the issues were fully and finally litigated. [Judge Albritton's decision in determining that the Defendant's PL1 debt collection letter violated the FDCPA is also a determination in the instant case that the Defendant's PL1 letter violates the FDCPA.] Because the Defendant had a full and fair opportunity to litigate the issue in Carn, the Defendant should be collaterally estopped from re-litigating this issue before this Honorable Court. As such, the issue is ripe for summary judgment.

3) Defendant's appeal of Carn does not interfere with court's ability to issue summary judgment or collaterally estop Defendant from re-litigating issues presented in Carn

The Defendant may argue that it chose to appeal the Carn decision to the Eleventh Circuit Court of Appeals. Such argument should have no impact on this Court's decision on summary judgment. Even with a strong argument and a weak decision from the District Court, neither of which the Defendant can claim, the Defendant faces long odds at the Eleventh Circuit Court of Appeals. According to the information provided by the Administrative Office of the United States Courts Statistics Division, the percentage of cases reversed by the Eleventh Circuit Court of Appeals is 9.1%.[6] The percentage of cases of a similar nature to the instant case and Carn reversed by the Eleventh Circuit Court of Appeals is 11.1%.[7]

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[6] Administrative Office of The United States Courts, Statistics Division, *Federal Judicial Caseload Statistics*, (March 31, 2007), http://www.uscourts.gov/caseload2007/tables/B05Mar07.pdf.

[7] Id.

Further, in order for the Carn decision to be reversed, the Eleventh Circuit Court of Appeals would have to find that Judge Albritton's Memorandum Opinion and Order are "clearly erroneous." Fed. R. Civ. P. 52(a). Given the narrow scope of review of the Eleventh Circuit, and the Appeals Court's low reversal rate, the Defendant's confidence of victory on appeal seems ill-founded. The case history in Carn, including the well-reasoned Memorandum Opinion and Order entered by Judge Albritton, only serve to strengthen the Plaintiff's likelihood of success on appeal. In light of these facts, the likelihood of a reversal by the Eleventh Circuit Court of Appeals is negligible at best.

F. Medical Revenue violated 15 U.S.C. § 1692e(4) by implying that nonpayment of the debt will result in the seizure, garnishment, attachment, or sale of Plaintiff's property or wages. Such implication was both unlawful and unintended.

15 U.S.C. §1692(e)(4) prohibits the following:

> "The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action."

The Defendant's PL1 debt collection letter implies that the Plaintiff's assets "may" be seized as the Defendant states its intent to determine "further collection efforts." The Defendant's letter lists four specific asset groups as well as information regarding the Plaintiff's employment and income. Further, it is clear that the Defendant's letter states, "[s]ince you have failed to pay this obligation we must determine your ability to repay this debt." The implication is that the assets will be used to satisfy the indebtedness. Given the circumstances, the "least sophisticated consumer" could reasonably believe that the defendant intended to seize, garnish, attach, or sell the Plaintiff's property or garnish the Plaintiff's wages. Even a reasonable person

would have cause for concern with all of the enumerated assets and threat of third party contact. [Section 1692e(4) requires the implication that non-payment will result in seizure, garnishment, attachment, or sale of Plaintiff's property or wages.] The implication is clearly present. The Defendant warned the Plaintiff that "you have failed to pay this obligation in full, we must [do the following]." In following exact wording of 1692e(4), the Defendant goes on to list property and wages with the implication that those items constitute "further collection effort[s]." In this instance, the reasonable juror is left with but one conclusion and that is the PL1 letter violates section 1692e(4). Clark v. Capital Credit & Collection Servs., 460 F.3d 1162, 1168 (9th Cir. 2006) ("Well-established canons of statutory construction provide that any inquiry into the scope and meaning of a statute must begin with the text of the statute itself.")

In Weiss v. Collection Ctr., 2003 ND 128 (N.D. 2003), the Supreme Court of North Dakota, while reviewing an appeal based upon summary judgment, was faced with a similar determination based upon a debt collector's threat to inquire about assets. In that case, the Defendant, CCI, sent the Plaintiff a debt collection letter stating, in relevant part, as follows:

> "PLEASE LET THIS LETTER SERVE AS ACKNOWLEDGMENT THAT OUR AGENCY HAS REQUESTED INFORMATION AND MADE AN INQUIRY TO THE MOTOR VEHICLE DEPARTMENT, REGARDING YOUR MOTOR VEHICLE(S)."

Weiss v. Collection Ctr., 2003 ND 128, P4 (N.D. 2003).

The Weiss Court opined that "[t]o demonstrate a § 1692e(4) violation, the Weisses must show (1) CCI represented or implied nonpayment of their debt would result in one of the above actions and (2) CCI could not lawfully take such action or did not intend to do so." Id. at 14.

In the instant case, the Defendant implies that the assets listed in the PL1 letter may be in jeopardy. The only way in which these assets could be threatened is via seizure, garnishment,

attachment, or sale. As such, the Defendant's PL1 letter implies that one of these actions will be taken against the Plaintiff's property. The Defendant, however, does not file lawsuits. Trial Tr. 18:2-6. The Defendant never takes any action other than repeated calls to debtors which stretch into perpetuity. Trial Tr. 22:16-24, 18:23-19:3. Based on this fact, it is apparent that the Defendant never intended to take any action which would lead to the "seizure, garnishment, attachment, or sale" of the Plaintiff's property or wages. The Defendant, therefore, is in violation of 15 U.S.C. § 1962e(4).

G. FTC Commentary

The Federal Trade Commission (FTC) is the primary enforcement agency of the FDCPA under the Act. 15 U.S.C. §§ 1692l(a), 1692m. Congress specifically charged the FTC with enforcement and administration of the FDCPA. See 15 U.S.C. § 1692l. The FTC has developed a Staff Commentary (hereinafter referred to as "the Commentary") on the FDCPA. 53 Fed. Reg. 50097-50110 (Dec. 13, 1988). Although the FTC's construction of the FDCPA is not binding on the courts, because the FTC is entrusted with administering the FDCPA, its interpretation should be accorded considerable weight. See Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). The 11th Circuit has also adopted this policy. Pickens v. Collection Servs. of Athens, Inc., 165 F. Supp. 2d 1376, 1381 (M.D. Ga. 2001).

The Commentary views § 1692e(5) in a manner indicative of the plain text of that subsection, focusing almost entirely upon threats, the legality of the actions threatened, and the intent of the debt collector to take those actions. 53 Fed. Reg. 50106(1988). The Commentary puts forth a well-reasoned explanation of what actions generally can and cannot be taken, some of which were discussed at length above.

In reference to § 1692e(10), the Commentary states that "[t]he prohibition is so comprehensive that violation of any part of [§ 1692e] will usually also violate subsection 10." Id. It also states that "[§ 1692e(10)], which prohibits the 'use of any false representation or deceptive means' by a debt collector, is particularly broad and encompasses virtually every violation, including those not covered by the other subsections." Id. at 50105. Therefore, every one of the enumerated violations under § 1692e falls within the scope of § 1692e(10).

Nowhere in the Commentary, however, does it state that claims arising from violations of multiple subsections are in any way dependant upon one another. On the contrary, it is clear that the Commentary views each and every violation as individual. Therefore, if a collection letter, or the language therein, may be violative of any of these subsections, the test for each subsection should be applied. The letter, or language therein, may fall short of one violation while fitting squarely inside another. The latter violation should not be discounted merely because the letter does not violate all sections that were tested.

CONCLUSION

The Fair Debt Collection Practices Act balances the right of creditors to collect valid debts, against the right of consumers to be free from the harassment and avarice of debt collectors. The FDCPA also seeks to place debt collectors on a level playing field. All consumers are protected, whether financially burdened by events beyond their control, or merely impecunious or unwise in incurring debts. Medical Revenue is guilty of violating 15 U.S.C. §§ 1692e; e(4); e(5) and (10) by using false, misleading, and deceptive means in its attempt to collect the debt.

WHEREFORE, for the reasons stated above, Plaintiff respectfully requests that she be granted summary judgment on liability.

Respectfully submitted this 18th day of January, 2008.

BROCK & STOUT

David G. Poston, Esq.
Walter A. Blakeney, Esq.
Michael D. Brock, Esq.
Gary W. Stout, Esq.
Post Office Drawer 311167
Enterprise, Alabama 36330
Tel: (334) 671-5555
Fax: (334) 671-2689
Email: christal@circlecitylaw.com

CERTIFICATE OF SERVICE

I, the undersigned hereby certify that I have this date served a copy of the foregoing upon James C. Huckaby, Jr., Esq., J. Kirkman Garrett, Esq., John G. Parker, Esq., and Stefanie Jackman, Esq., via electronic mail at jch@hsdpc.com, jkgarrett@csattorneys.com, johnparker@paulhastings.com, and stefaniejackman@paulhastings.com, this 18th day of January, 2008.

David G. Poston

EXHIBIT "1"

Medical Revenue Service is a collection agency retained to represent the below named creditor. Since you have failed to pay this obligation in full, we now must determine your ability to repay this debt. The information we may be seeking, if available, to determine what further collection effort to take is:

1.) Real estate ownership/equity
2.) Personal property assets
3.) Savings, checking balances
4.) Your source of income
5.) Automobile ownership
6.) Verification of employment

Unless you notify this office within thirty (30) days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid. If you notify this office in writing within thirty (30) days from receiving this notice, this office will: obtain verification of the debt or obtain a copy of a judgement and mail you a copy of such judgement or verification. If you request this office in writing within thirty (30) days after receiving this notice, this office will provide you with the name and address of the original creditor, if different from the current creditor.

Please make your check or money order payable to Medical Revenue Service. In order to assure proper credit to your account, include the reference number with your payment. We also accept "check by telephone" for your convenience. If you have any questions, you may contact an account representative at the above listed phone number.

Pursuant to Section 807(11) FDCPA, this communication is from a debt collector and is an attempt to collect a debt. Any further information obtained will be used for that purpose.

A. U. Clancy
Collection Department

AUC/tb

Account #	Client Name	Service Date	Balance	Patient Name
E0323100026	Medical Center Enterprise	08/19/2003	55.00	Passmore, Cynthia F
E0333200036	Medical Center Enterprise	11/28/2003	75.00	Passmore, Cynthia F
E0322400161	Medical Center Enterprise	08/12/2003	447.65	Passmore, Cynthia F

TOTAL BALANCE: $577.65

Cynthia Tonney
6-24-64
SS# 418-06-8319

224016

EXHIBIT "2"

financial controls.

Q. Is Medical Revenue Services a debt collector?

A. That is one of the processes that we do, yes.

Q. And that is what we are here about today, is their function as a debt collector; is that correct?

A. That is affirmative.

Q. What is a secondary debt collector?

A. It is a term that we coined but has become more or less standard phraseology in the industry where, when a debt is not repaid, it used to go to a collection agency and that was the end. And the business that we developed was the account goes to a collection agency. If the collection agency is unsuccessful in collecting the debt within a certain period of time, it is then passed on to a secondary collection agency, us, and we handle the account forever.

Q. Okay. You handle the account forever?

A. That is correct.

Q. What do you mean by that?

A. The account stays on our records forever as long as the client is with us.

Q. So you continue to attempt to collect a debt indefinitely?

A. And credit report it until the statute says it can no longer be credit reported.

Q. Okay. And Medical Revenue Services is a secondary

Q. Approximately twenty-five years, okay.

MR. BROCK: Judge, I would move now to just go ahead and admit both Plaintiff's Exhibit "A" and "B" and I think we can stipulate to that.

MR. McGILL: Yes.

THE COURT: Okay. Let me see if I have got this. Plaintiff's "A" is a letter from Medical Revenue Services to James Cambron, dated 4-19-05, and Exhibit - is this "A" and "B?"

MR. BROCK: "B" is separate and it is dated 5-24-2005, to Wendy Cambron.

THE COURT: To Wendy Cambron, okay. And those are admitted.

MR. BROCK: Thank you.

BY MR. BROCK:

Q. In the opening statement, your lawyer stated that this letter is sent out to every single debt. I mean, how many of these letters does Medical Revenue Services send out a year?

A. Give me just a second to answer that. This would be a very rough answer.

Q. That's fine.

A. Probably something in the vicinity of about 1.8 million.

Q. So about 1.8 million letters annually, and Medical Revenue Services operates in how many different states?

that we institute the lawsuit.

Q. Well, my question to you is simple. Does Medical Revenue Service file lawsuits in the state of Alabama?

A. I do not believe that we have a client in Alabama that has us do lawsuits. So, therefore, I believe the answer to that is no.

Q. And this letter that you send out is the initial letter, Plaintiff's Exhibit "A" and "B" is the initial letter that you send out on all accounts that are due the hospital; is that correct?

A. Yes. Every account that we get, we have an obligation to send out a letter on every account that we get. And on the vast majority of the accounts, the only letter that they will get is this letter and, if we didn't have to send out letters, we wouldn't send the vast majority of them out.

Q. I am sorry. What did you say?

A. I said if it wasn't for the fact that we are required by the Fair Debt Collection Practices Act to notify them by a letter, the vast majority of these letters that are sent out, we would not send out.

THE COURT: Excuse me. Then do you follow up with a telephone call?

THE WITNESS: Yeah. All of our business is done on the phone, not by letters, for all intents and purposes.

Q. All of your business is done by the phone; is that

correct?

A. The vast, vast majority of the money that we collect is money that we collect by talking to the guarantor.

Q. All right. Now the letter states the information you may seek, if available, to determine what further collection efforts to take and then you list real estate ownership and equity; is that correct?

A. That is affirmative.

Q. Okay. Now my question to you is would foreclosing on the Cambrons' home be a further collection effort?

MR. McGILL: I would object, Your Honor.

A. Yes.

MR. McGILL: I don't understand the relevance of that question.

MR. BROCK: Well, I think it is -

THE COURT: Excuse me. I will overrule the objection. Answer it again. Why don't you re-ask the question?

BY MR. BROCK:

Q. My question is, and I base this upon your letter, you list real estate ownership and equity. My question to you and, again, Judge, the basis of this is a least sophisticated consumer. My question to you is would foreclosing or taking the Cambrons' real estate be a further collection effort?

MR. McGILL: I am going to again object and state to Your Honor that there is nowhere in this letter that even

correct.

Q. Okay. And my question to you is -

A. Sometimes unfortunately it will take a while before action is taken on the account, before it even starts to be worked. That is why I can't - I can say it was in our agency from that point in time.

Q. But you were working on this case for almost four years prior to the debtor filing bankruptcy; is that correct?

A. Yes.

Q. Okay. And you have no idea whether or not Mr. Cambron owned any real estate; is that correct?

A. That is correct, yes.

Q. Now is finding out whether or not a debtor has real estate, is that available; is that information available?

A. Yes.

Q. Well, after four years, you don't have any idea whether or not he owned any real estate?

A. No one made a decision that it was worth spending the money to research the account further from the way that the account was being handled.

Q. Well, why is it that you listed real estate ownership and equity on your letter?

A. Because it said "may." We have one letter -

Q. No, it says, "may, if available." It is available. I am a bankruptcy attorney. I look up real estate all of the

Q. What about automobile ownership? Your letter states that this is some information, number five, automobile ownership. Information we may be seeking if available to determine what further collection efforts to take is automobile ownership. Did either Mr. Cambron or Mrs. Cambron own any automobiles?

A. I don't know the answer to that. Your Honor, we are going to go through six different questions here and I guess I can answer all of them to say that, you know, we send out a letter and it says we may do these things, and the answer is no. So we can take a lot of time asking it six times or we can answer it no.

Q. Okay. So you are testifying in this case that you did not do any of these six items listed on Plaintiff's Exhibit "A" and "B" on either Mr. Cambron or Mrs. Cambron?

A. Because I don't believe, and then I will have to maybe stop here, those are things that we would normally do when we get a hold of the person on the telephone, and those are the standard questions that the collector is asked to ask when they talk to them because that is how we collect our money, and it would appear that we didn't get the opportunity to do that.

Q. Over a four-year period, you didn't get the opportunity to do that?

A. That is correct.

Q. So are you telling me that the only way you get the

to seize any of the assets of the Cambrons; is that correct?

MR. MCGILL: I will object to the question, Your Honor. There is no statement that there is going to be any seizure.

THE COURT: Overruled.

A. Ask the question again. I am sorry. Please.

Q. My question to you is Medical Revenue Service, at the time of sending these letters, had no legal right to seize any of the assets listed -

A. At the time that the account was placed with us, it was not placed simultaneously with a judgment already on it, no.

Q. And there was no judgment at the time of these letters; is that correct?

A. No, sir, not that I am aware of.

Q. In your letter when you refer to further collection efforts, what are you referring to if it is not to seize any of the assets?

A. Further collection efforts. It means that we are going to continue to try to collect on the account, and I could go into a very, very long answer on that, which I don't think we want to go too much, but it would be that we would continue making phone calls, we will continue to keep the - we will continue to make phone calls. We will get further information on the account frequently. As you can see, this person here has a regular flow of accounts coming to us and each time the

account comes to us, there can be more information than there was the last time when the account was placed with us. The person's financial position could have changed. We might actually get a good phone number on the second or third placement, etc., so we are just going to keep on trying to call them.

Q. So your further collection efforts, from what you're testifying to, simply means more calls, more letters?

A. Yes, unless something extenuating was to happen, yeah. Like if the account was - there is no sense going on.

THE COURT: This may be off the point. I am just curious. I see that the earliest entry on this Mr. Cambron letter is 3-26-1997, was the date of the medical service. How long are hospital bills collectible in Alabama?

THE WITNESS: Well, this is -

MR. BROCK: It was way past the statute of limitations.

THE WITNESS: This is where you come to what is a rather confusing answer and, typically speaking, there is a difference between - if the question is how long can you sue a person for, then it is your statute of limitations, which would be like six or seven years, but most people feel that that does not mean that there is not a moral obligation to continue to pay. The statute doesn't say that all debts are forgiven; it just says that they are no longer legally enforceable. But if your conscience was to change, you still have a moral

A. I am sorry?

Q. When you send this letter out, you have got these six things listed.

A. Right.

Q. That you may seek, if available?

A. They are all things that we may do.

Q. But in every case you are not going to have to go through all of this stuff; are you?

A. No, absolutely not.

Q. Sometimes you can call people up and just get a payment; can't you?

A. Yeah, particularly, as I just answered, particularly with co-pays if you can establish phone communication with them and convince them that the amount is payable, in a large amount of the circumstances they will pay the bill.

Q. Okay. Now Mr. Brock had asked you in the past about filing lawsuits in Alabama. I want to clarify that for the judge and make sure he understands that situation. When you file a lawsuit, do you file it in the name of Medical Data or do you file it in the name of the actual creditor? Tell me how the process works.

A. Well, because we are representing the hospital, then we will ultimately in some situations we will tell the hospital that we think they should initiate suit against the individual or sometimes the hospital will tell us that they think there

A. I just answered that question, I think.

Q. I missed it. I apologize.

A. Okay. I said the Fair Debt Collection Practices Act, my recollection of it - I don't have the act sitting in front of me here - says that we have to notify the debtor that the debt has been assigned to us and, as part of that notification process, we also have to make sure that the letter includes the specific wording that says unless you notify, dot, dot, dot.

Q. And it doesn't require one through six, yes or no? It does require it or it does not?

A. It does not require it.

Q. Thank you. Did you pull a credit report? You stated that you report to the credit bureau.

A. That's correct.

Q. Did you ever pull a credit report for Mr. Cambron to determine his ability -

A. According to these, we did not, no.

Q. You never did? Why not?

A. The debt collector decided that it wasn't worth the expense to do it.

Q. Okay. So what is the expense? I mean, do you have to have an amount of debt before you will pull a credit report? I mean, you would be able to tell about a person's assets from his credit report; wouldn't you? You would be able to tell if he had a vehicle or owned any real estate?

EXHIBIT "3"

that Notice of Deposition?

A. I provided you with what we were able to provide you with. Let's go through them and see if you're missing anything.

Q. Okay. Well, as far as I can understand -- and I'll go ahead and mark these as well.

(Whereupon, Plaintiff's Exhibit 3 was marked for identification and same is attached hereto.)

Q. I'm going to hand you what's been previously marked as Plaintiff's Exhibit No. 3. Can you tell me what that is?

A. It's called a Debtor Face Sheet, and it's just a printout from our computer collection system that gives the information that we have stored on the account. It's what shows for a collector when he's working the account.

Q. Okay. And we're here today on two different matters: One, James R. Cambron; and another, Wendy L. Cambron.

data in the hospital's format. And then they'll put it through a system to rearrange the data and sort it in such a manner -- put it into another file so that the data is ready to load into our collection system. And now that account will also be sent to the credit bureau and pull credit bureau information on it, which will come back and be loaded into the system and --

Q. Let me stop you right there. So on all accounts that y'all receive --

A. We have some parameters that we won't do. Like if the account balance is -- if the total of all the accounts is less than $50 -- if we've made a pull on the account in the previous six months -- on the guarantor in the previous six months.

Q. So when you say you report it to the credit --

A. We don't report it.

Q. Can you go over that again? You do a credit check?

A. We make an inquiry. We pay 18 cents an account; and they load back to us alternate

Q. Okay. So four and a half months after the first letter was sent out, a subsequent letter was sent out?

A. Yeah.

Q. After reviewing Plaintiff's Exhibit No. 3, can you tell whether or not a collector for Medical Data Systems ever made telephonic conversation with James Cambron?

A. It looks like no answer, no answer. They tried several times but were unable to -- I don't see anything here where they have.

Q. All right. After --

A. Let me just make sure I'm reading all the notes.

Q. Sure. Again, I'm just looking for after the letter that was sent out on April 19th, 2005, Plaintiff's Exhibit No. 6.

A. No. There were several attempts, but they were never able to talk to anybody.

Q. So back to the general policy or practices of collecting a debt by Medical Data. After you send out the letters and make telephone calls and attempt to collect the debt, what else

happens, if anything?

A. They will continue to collect the data -- they will continue to attempt to collect the data.

Q. By doing what?

A. By repeated phone calls on the person, any updated information that comes from the hospital. As you can see from this file, frequently, the person is coming back again and again. And so there might be updated information that comes, like a new telephone number or whatever, which will allow them to get started on another path.

They might determine that, you know, from the looks of things here, we want -- but, basically, they just -- they sit out there. The collector has got -- if the hospital hasn't placed new accounts with him for a couple of months, they're scrounging through all their old accounts, trying to rejuvenate them again.

Q. So besides sending out letters and besides making telephone calls, what else, if anything, does your collectors do in attempt to

spoke to him.

Q. You would ask the debtor whether or not he owns any real estate?

A. Yes.

Q. Does Mr. Cambron have any equity in his home?

A. It's just part of that manual that you're going through, and I just brought it out as something to look at.

Q. My question is --

MR. McGILL: Answer his question.

Q. My question is, Does Mr. Cambron have any equity in any real estate?

MR. McGILL: To the best of your knowledge.

A. To the best of my knowledge, at this point in time, I don't have an answer to that.

Q. Well, if that information -- if Medical Data Systems had that information, where would it

be, if not in the face sheet? What other records -- are there other records that you did not provide us that that information would be in?

A. No. It would be in here or in the collector's head, if he had spoken to them and not entered the notes into the system.

Q. Does your policy require your collectors to annotate any information they obtain from the debtors, or are they allowed to keep it in their head and not put it down on paper?

A. They are asked to put notations of the relevant points of the conversation.

Q. And are they -- how many calls are your collectors asked to make each day, according to your manual?

A. They're supposed to make -- a minimum performance level is to attempt 120 attempts a day.

Q. 120 attempts a day? And so your policy is not, after making 120, that they maintain the information in their head, it's that they put them on the face sheet; is that correct -- if they receive any information?

A. Their policy is that they are to attempt

120 calls a day, and our policy is that they are to -- when they're finished talking to a debtor, to put the notes in the system.

Q. So what you're telling me is the only attempt that Medical Data Systems makes in order to determine real estate ownership is to ask the debtor?

A. At that point in time, it could be accomplished -- no. That's not what I said.

Q. Okay. Well, then, correct me. What other -- I asked you if he owns any -- had any real estate ownership, and you said you didn't know. That's one of the questions you would ask the debtor. What other --

A. I'm trying to answer your questions, and you keep changing the question midstream between a generic combination of all the debtors in the world --

Q. I'm specifically -- I apologize. I'm specifically only asking you questions -- and that's why I preface it with Mr. Cambron -- only Mr. Cambron. Let's go back. If I need to repeat it, if you're confused -- does Mr. Cambron own any

do for a debtor?

A. Now you're changing it.

Q. Well, I have the right to do that, sir. It's my deposition. You're job is to answer the questions. My job is to ask the questions.

A. I'm being very, very diligent at trying to answer your questions.

Q. Well, I don't understand what the confusion is. Let's start all over, then. We'll start all over, and we'll make this go out as long as it takes so you'll understand my questions. I apologize for my inability to ask you a question that you understand.

I want to know what Medical Data Systems does to determine whether or not a debtor -- any debtor, not just James Cambron -- has any assets. One, I know that they call the debtor and ask them, Hey, do you have any assets? Two, I know at times -- not with Mr. Cambron, but at times -- you pull a credit report. Three, I know you call neighbors and ask, Does he live next door to you? I don't know if that's looking for an asset, but that was the response I got to that question.

I would like to know what else does Medical Data Systems do to determine whether or not any debtor -- not just Mr. Cambron -- whether or not he has any assets.

A. You have covered the available basis.

Q. Thank you.

A. I think -- yeah.

Q. Okay. Let's switch over to Wendy Cambron. And you have previously testified that you have never pulled the credit report. Now, I am going to repeat some of these questions simply because I'm taking depositions for two cases at this time. Can you tell me whether or not Ms. Cambron had the ability to pay this $175 debt?

A. I can give you the exact same answers to all those questions that you just asked about this individual to this individual.

Q. So you would have no idea whether or not she had the ability to repay the debt?

A. I can give you exactly the same answers that I gave --

Q. I'm taking the deposition for two different people.

Q. How long have you been in the collection business?

A. Ten years.

Q. Ten years? And you have no idea, as you've stated -- and I'm reiterating -- that you could discover whether or not an individual owned an automobile through a public record or owned any real estate through a public record?

A. I would -- thank you for allowing me to clarify that answer. I don't know how to do it.

Q. But do you know that it can be done?

A. It would seem to be logical that it could be done in some way. I don't know how to do it.

Q. But the only steps that Medical Data takes is to ask the client or through a credit report; is that correct?

A. That is correct.

Q. Why is it in your letter, Plaintiff's Exhibit No. 6 and 7, that you state that you are going to determine what further collection effort to take by asset ownership? Why do you put that in your letter?

A. Those are all questions that we intend to ask them.

Q. Okay. Well, if you intend to just ask them on the telephone, why do you put it in your letter?

A. We're required by law to send them a letter.

Q. Why do you not put it in your letter that you are going to ask them whether or not they have any real estate ownership or equity or whether -- you're going to ask them -- why do you tell them in your letter that the information we may be seeking, if available, to determine what further collection effort to take is -- why don't you -- if that's what you do, why don't you put it in writing, that we're going to ask you whether or not you own any land?

A. This letter was written by my partner about 20 years ago. I never have asked him that question, honestly.

Q. You've never asked him that question?

A. No.

Q. Do you think it's possible that the

Q. Okay. From a debt collector's perspective, is what I would like to know. From a debt collector's perspective -- do you know the definition of unsophisticated consumer from a debt collector's perspective?

A. I have never seen an accepted definition.

Q. Okay. That's fine.

A. I would love to.

Q. Well, I'll be happy to show you one.

Okay. So if -- and this is a general debtor question, not to Mr. Cambron or Ms. Cambron. If you call up a debtor and your collector says, Do you own any real estate ownership? He says, No. Do you have any personal property assets? He says, No. Do you have any savings and checking balances? He says, No. Do you have any income? He says, No. Do you have any automobile insurance? He says, No -- to all these questions that you have listed in your letter, what does Medical Data Systems do?

A. At that point in time, if the collector has asked those questions, felt that he's got a

good answer, he would Z the account.

Q. What does "Z the account" mean?

A. Give up.

Q. Okay. Is that in your policy manual that that's what he does?

A. I think if you read through it -- I haven't read that one.

Q. And that's Plaintiff's Exhibit No. 5.

A. Z is the end of the road. In our procedure, eventually, you have to stop your efforts, other than credit reporting.

Q. Well, my question is, If he answers no to all those questions, does your policy manual --

A. I don't know the answer to that.

Q. You don't know?

A. But I could tell you that most collectors, at that point in time, would put the account in Z.

Q. Would they do that after the first telephone call if they get a no to every one of those answers?

A. If I was on the phone with a -- if a collector was on the phone with a debtor and the

debtor said that -- when they ask them -- because they're going to ask them just from a -- you know, look, we've got a debt here. We've got a problem. We've got to get this paid off somehow. Do you have -- that would be wonderful. Do you have equity here? Is there something we could do with that? Do you have any assets? We're going to be looking for -- is there something they could get a loan on to pay it?

If they said, We don't have any -- a hypothetical question here -- we don't own the property. We're renters. We don't have any assets. We rent our furniture. We don't have any checking -- I don't have a checking account. Nobody will let me have a checking account. My employer pays me in cash. I only make 50 bucks a week. I don't own a car. My friends drive me around -- and we've got nothing else at that point in time, almost all of my collectors would say, I give.

Q. Okay. So they just take the debtor's word on it?

A. That's correct.

to work through -- that a hundred percent of the accounts that are placed with us -- we will pull an automatic credit bureau on them because we've got down to the point where it's 18 cents.

Q. Anything else besides the credit report?

A. No.

Q. Do you call up Alabama Department of Public Safety to determine any ownership interest of an automobile on an account that's placed in Alabama?

A. I know that there are certain things that certain collectors will do. There are certain things that certain managers will do that are -- embellishments, extensions -- that have different degrees of resourcefulness to go after different items. There's a --

Q. Is it the policy of Medical Data Systems to call the Alabama Department of Public Safety on an account that's in Alabama to determine automobile ownership?

A. On every account that's placed with --

Q. On any account. The policy of Medical Data Systems.

A. At this point in time, I think I would probably have to answer no. But to further expand upon that answer, I've got five different offices that could be handling accounts in Alabama.

Q. And the policy now and in 2005 is that you do not contact the county that the debtor resides in to determine -- through the probate court here in Alabama -- whether or not he has any real estate ownership?

A. I can answer to you that in the Sebring office -- because that's the office that we're referring to here. It wouldn't be fair -- you know, it wouldn't be appropriate for me to tell you what the Alabama office does.

Q. In the Sebring office --

A. In the Sebring office, I did not see anything in their operations manual that indicated they were under the policy of doing that.

Q. Okay. But you would agree, as earlier, that those avenues are available; correct: Public records of automobile ownership and real estate ownership?

A. Uh-huh.

EXHIBIT "4"

Q. Has anyone told you what would be a correct answer?

A. No.

Q. Have you been threatened with your job if you gave an incorrect answer?

A. No.

Q. Have you reviewed any documents in preparation for this deposition?

A. No.

Q. And speaking of documents, is that your collection manual?

A. Yes, sir. Now, it's three and a half years old so it's not like the other ones.

Q. Okay. And I'm not going to keep it. I'm just going to --

A. That's fine.

Q. In your job at Medical Data how are you employed presently?

MR. McGILL: What is your job?

Q. What is your job title?

A. I'm a medical bill collector.

Q. Okay. You work on the collection side?

A. Yes, sir.

Q. How long have you been there?

A. Three and a half years.

Q. Let's suppose that you've set up a payment plan and the debtor makes ten timely payments but then defaults and your next teammate calls that debtor and he begins making ten more payments. Who receives the bonus for the second ten payments?

A. The person who is assigned that facility.

Q. And there are multiple people assigned facilities?

A. No.

Q. Are you the only person that collects for --

A. Lower Florida Keys? Yes, sir.

Q. So, for example, when you collected for Flowers Hospital were you the only person assigned to Flowers Hospital?

A. Yes.

Q. Will you be assigned a different hospital from day to day?

A. No.

Q. Will it change from month to month?

A. It could, yes.

Q. It could change. Okay. I want to go back a bit to your training and your day-to-day collections with Medical Data. When you get a debtor on the phone do you ever ask them if they own real estate?

A. No, sir.

Q. When you get a debtor on the phone do you ever ask them if they own an automobile?

A. No, sir.

Q. When you get a debtor on the phone do you ever ask them if they own a savings account?

A. No, sir.

Q. When you get a debtor on the phone do you ever ask them if they own any other personal assets?

A. No, sir.

MR. POSTON: Can we go off the record for just a second, please?

(Discussion off the record.)

Q. Now, Ms. Thomas, I'm a bankruptcy attorney, have been a bankruptcy attorney, so I certainly appreciate payment plans, so I'm sure that my clients and the people you call are generally the same people. So it wouldn't surprise me at all to know that when you talk to debtors that they want payment plans. Is that an accurate statement?

A. I'm sorry. Would you say that one more time?

Q. Is it safe to say that when you talk to debtors that they will ask for payment plans?

A. Yes.

Q. When you are setting up a payment plan will you generally ask them if they have a house payment?

A. No.

Q. You won't ask them if they have a house payment?

A. No.

Q. Will you ask them if they have a car payment?

A. It depends on the balance of the account.

Q. Is there ever a threshold amount that you just will not even work a payment plan?

A. I would say under three hundred dollars.

Q. You will not try to institute a payment plan?

MR. McGILL: I think we're sort of leaving off the rest of that. Is the question you won't institute a payment plan if it's under three hundred dollars? Is that what you mean?

MR. POSTON: If I didn't say that correctly, that's what I meant.

MR. McGILL: Okay. I just wanted to make sure.

A. There's a couple of different ways you could do that. You could ask them if they would be able to defer an auto payment for one month.

Q. Okay.

A. You would ask them if they would be able to do seventy-five dollars for four months. You would ask them if they could do one fifty for two months. There's different ways that you work out a payment plan.

month. You work with them.

Q. During the payment plan process, during the payment plan process, do you inquire about how much rent they pay?

A. Yes, we do try to base this on a monthly income.

Q. During the payment plan process do you inquire about what their mortgage payment may be?

A. Yes.

Q. During the payment plan process do you ever ask them if they own any other real estate?

MR. McGILL: Aside from the house?

THE WITNESS: Right.

MR. McGILL: Is that the question?

MR. POSTON: That is the question.

A. No. No.

Q. Okay. So if you called me and I said, "Look, my mortgage payment is $2,005 a month," would you ask me, for example, "Well, do you own any other real estate?"

A. No.

Q. During the payment plan process do you ever inquire about the amount of their car payment?

A. Again, only to establish their monthly income and deferring a payment.

Q. So the car payment is pertinent in your mind if there is the ability to defer a car payment?

A. Right.

Q. Is it important to you whether that debtor may own vehicles that are paid for?

A. No.

Q. Is that important at all?

A. Not at all.

Q. Okay. Is it important to you at all whether that debtor may own real estate aside from a house payment?

A. No.

Q. Is it important to you whether that debtor may own other personal property assets?

A. No.

Q. Is it important to you how much money the debtor has in his checking balance?

A. When you present that check to the bank it is.

Q. That's the only time that it's important? Do you ever ask the debtor, "How much money is in your checking account?"

A. No.

Q. Do you ever ask them, "How much money is in your savings account?"

A. Absolutely not.

"Do you have any disability income?"

A. No.

MR. McGILL: I'll object to that. If they are disabled they probably don't have any other income.

Q. Assuming that the debtor works and assuming that the spouse works, would you ever inquire about child support income?

A. No.

Q. Would you ever inquire about annuity income?

A. No.

Q. Would you ever inquire about stock income?

A. No.

Q. So, in your mind, employment income is really all that's relevant in trying to set up payment plans?

A. Right.

Q. Okay. Fair enough. During your training, during your training, did you ever receive training on how to discover an asset?

A. No.

Q. Do you know what an asset is?

A. Something that is owned.

Q. Yes. Did you ever receive any training on how to discover automobile ownership?

A. No, sir.

Q. Have you ever received any training on how to

search for real estate ownership?

A. No, sir.

Q. Have you ever received any training on how to discover checking account balances?

A. No, sir.

Q. How about training on how to discover the existence of a checking account?

A. No, sir.

Q. How about discovering the existence of a savings account?

A. No, sir.

Q. Or a savings account balance?

A. No.

Q. Have you ever received any training on how to discover a source of income apart from employment?

A. No, sir.

Q. In your employment do you ever pull a debtor's credit report?

A. No, sir.

Q. Do you ever have the occasion to pull a credit report?

A. No, sir.

Q. Would you even know how to pull a credit report?

A. No, sir. For a debtor? For myself?

A. Yes, sir.

Q. So nothing in that conversation led you to believe that she was going to file for bankruptcy then?

A. No, sir.

Q. Suppose she had said that she was going bankrupt, "I'm going to file bankruptcy," what would you have typed in?

A. B-k-r.

Q. B-k-r. Fair enough. That looks like the last contact that you had with Mrs. Vaughn. Is that a correct statement?

A. Yes, sir.

Q. If you had asked Mrs. Vaughn whether she owned any real estate, would you have written it in there?

A. Yes, sir.

Q. If Mrs. Vaughn had told you that she owned a car, would you have written it in there?

A. Yeah. Yes.

Q. If Mrs. Vaughn had told you that she had money in her checking account, would you have written that in there?

A. I probably would have asked the team leader on that because that would probably -- that's personal information and I'm not sure on that.

Q. So, in your mind, asking about checking

balances and savings account balances is of a private nature and that you should not be inquiring about them?

A. Right.

MR. McGILL: I'll object.

Q. Is that a correct --

MR. McGILL: I don't know exactly what you said, but I'll let you clarify.

Q. Is that a correct statement?

A. I'm sorry?

Q. Okay. Would you never ask a checking account balance because you believe that to be private?

A. Right.

Q. Would you never ask a savings account balance because you believe that to be private?

A. I wouldn't ask it either whether it was private. I just wouldn't ask it.

Q. Thank you.

A. That's none of my business.

Q. Okay. Could the same be said about automobiles? And that is, would you never ask whether they owned a car free and clear?

A. Right.

Q. You believe that also to be none of your business?

A. That is correct.

EXHIBIT "5"

Q. What were the nature of the depositions?

A. Primarily in the area of -- most of them were concerning vehicle accidents that employees that reported to me were involved in.

Q. Have you given any depositions in connection with being employed as a collector?

A. No.

Q. Have you ever been employed as a collector other than at Medical Data?

A. No.

Q. Fair enough. How long have you been at Medical Data?

A. Since December of 2003.

Q. How long did you work as a collector?

A. About six to eight months.

Q. And since that time you have been working in a supervisory capacity?

A. Primarily, yes.

Q. Tell me again when you started.

A. December 2003.

Q. So through June of '04 you were a collector and after that you were a supervisor?

A. Approximately, yes.

Q. Mr. Heath, in your capacity as a collector have you ever had the occasion to talk to debtors who owed

A. No, I do not know that.

Q. Have you ever seen any of your co-workers fired because they were not making enough phone calls?

A. No.

Q. So that really is more of a suggestion then, the number of calls?

A. It was a goal.

Q. It was a goal. Tell me again what the goal was, the number of calls per day.

A. I don't honestly remember during that period of time.

Q. Do you know what it is today?

A. Our goal today is in the area of 120 calls.

Q. Do you recall if that's changed since you were a collector?

MR. McGILL: If you know.

Q. Yes. Sure. If you know.

A. I really don't recall what the goal was then, so I don't know.

Q. When you would contact a debtor and you would obtain the information from the debtor, would you key it directly into the computer or would you write it down?

MR. McGILL: Do you understand where he's going?

THE WITNESS: No.

MR. McGILL: Okay. Well, let's ask him to rephrase it. You seem to be questioning him.

Q. As a collector you would talk to a debtor. You have got the telephone or either a headset. The debtor gives you information. Would you write it down or would you type it directly into the computer at the time?

A. Situational. It depends on the situation.

Q. Okay. Again, not meant to be a trick question. It's just simply your habit.

A. I understand. Situational again. If it was a credit card payment it was written down in hard copy. If it was conversation, then it was reported on the computer.

Q. So you're one of those guys that would type it out as you went?

A. Yes.

Q. Okay. Some of your co-workers apparently write it down.

A. Okay.

Q. And then they type it in.

A. No, no. I would type it in as I went.

Q. Okay. Typically you would type it in. If you talked to someone about automobile ownership would you have written it down on the computer?

A. Yes.

Q. If you talked to someone about real estate ownership would you have written it down on the computer?

A. Yes.

Q. If you talked to someone about the amount of money they had in their checking account would you have written it down on the computer?

A. Not the dollar amount, only that they acknowledged they had an account.

Q. If they acknowledged they actually had money in the checking account would you have noted that fact on the computer?

A. A valid checking account, yes.

Q. If they told you that they had other personal property assets would you have noted that on the computer?

A. Yes.

Q. If they told you that they had a source of income besides employment would you have noted it on their face sheet?

A. Yes.

Q. Fair enough.

(Plaintiff's Exhibit No. 11 was marked for identification.)

MR. POSTON: Plaintiff's Exhibit Number 11.

days, whatever. That's what it means, it reassigned the days.

Q. Would you say that entering information in the computer is something that you as collectors are trained to do?

A. Yes.

Q. Would you agree that all -- I'm not going to use the word "pertinent". Would you agree that data pertaining to a wide variety of topics is entered on the computer during the collection of the accounts?

A. I'm not sure of wide variety.

Q. He doesn't like my word "pertinent" today. He's objected to it.

MR. McGILL: It's just subjective, that's all, but whatever.

Q. In relation to collection of accounts, information that the debtor tells you regarding assets would be entered on the computer?

A. I would have, yes.

Q. You would have?

A. (Witness nods head.)

Q. I think everyone has testified to that today.

MR. POSTON: That's it. That's all I've got.

MR. McGILL: All right. I guess we are done with you.

EXHIBIT "6"

you, but I'm talking about where you either go into a classroom setting, whether you view a videotape, whether you listen to a lecture, any type of training of that magnitude, have you had any other training in the collection process since that time?

A. Yes.

Q. You have? Would you tell me about that?

A. We periodically have group forums.

Q. Tell me about a group forum.

A. They are small group forums --

Q. Yes, ma'am.

A. -- specifically of our team members, so there's anywhere from seven to ten individuals.

Q. Okay.

A. We strategize about different talk-offs, better verbiage to use, techniques to resolve debts, collection of debts, how to work with a debtor on establishing payment plans and payment arrangements. We've had meetings regarding changes in policies and practices, things that we would currently be doing that would be modified or changed to a new process. We would meet and go over the new technique.

Anything from the wording of the mini-Miranda, the presentation of it, the sequence of when you contact someone, to general information about changes in the

expanding --

Q. Okay. Your first week of training did not consist of locating assets?

A. No.

Q. Okay. Since that time have you had any training about locating assets?

A. Yes.

Q. Tell me about it.

A. In assessing eligibility for referral to legal status, I was trained how to contact the clerk of county court to determine if there was physical property ownership.

Q. And when did that training occur?

A. Twelve to eighteen months ago.

Q. Twelve to eighteen months ago. Okay. Have you ever contacted the clerk of court pertaining to the location of personal property assets?

A. Could you be more clear?

Q. You said you had some training pertaining to the location of assets, some subsequent training to your initial training.

A. Uh-huh.

Q. And you had some training regarding contacting the clerk of court regarding the location of assets. Is that a true statement?

an account, a debtor is going to owe a certain amount of money. Fair enough?

A. Absolutely.

Q. Is there a certain amount of money that a debtor should owe before you will contact a clerk of court regarding land ownership?

A. Yes.

Q. What is that amount?

A. In my particular circumstance it's a minimum of $500.

Q. So your testimony is that anything over $500 you might contact the clerk of court to determine land ownership?

A. I might, yes.

Q. And anything under five hundred you would not contact the clerk of the court?

A. No.

Q. Would you say that you never contact the clerk of court for anything under $500?

A. Yes.

Q. Or, stated another way, you do not contact the clerk of court for any debt less than $500?

MR. McGILL: Ever --

MR. POSTON: Ever.

MR. McGILL: -- during the history or life of

the account?

Q. If you receive an account for less than $500 will you contact a clerk of the court to determine land ownership?

A. I would not contact the clerk of court regarding ownership with a debtor balance less than $500 ever.

Q. Okay. Thank you for clarifying that for me, because I told you that I had trouble getting these questions just right. Thank you.

Okay. Now, let's then just talk about accounts over $500. Now, is it safe to say you do not contact the clerk of court for every debtor that you're collecting on?

A. I do not contact them for every debtor.

Q. Obviously, if you called me and you said that I owed you $1,500 and I said, "Here you go," there would be no need to contact them?

A. Absolutely.

Q. Why waste your time, right?

A. Take your money, yes, sir.

Q. Okay. So, what circumstance -- you're an experienced collector, I know that. What circumstance would prompt you to contact the clerk of court?

A. The criteria of account balance owed by the

debtor, whether it's one or collectively five hundred, gainful full-time employment, and a refusal to make any type of reasonable payment arrangement.

Q. Okay. In your mind that's going to be the top three right there? There may be others, but that's the top three?

A. Those three must be present to prompt me even to think about it.

Q. So if a debtor is not employed, you would not contact -- let's go through those three. I'm just going to set up a hypothetical. A debtor owes $10,000, the debtor tells you he's not employed and he would be more than happy to pay you ten dollars a month. Would you contact the clerk of court under that scenario?

A. First, I wouldn't be required to qualify him.

Q. Because?

A. Because a ten-dollar monthly payment on a $10,000 balance isn't reasonable. It would take over a hundred years to pay that. That's not reasonable.

Q. Okay. Fair enough. But if he told you, "All I can pay is ten dollars a month because I'm not employed" --

A. I would still have to attempt to qualify him for a reasonable payment arrangement.

Q. But if he said, "Look, ten dollars is all that

I've got, all I can pay," would you contact the clerk of court to determine real estate ownership?

A. At that point, age, prior history on the account, would come into play. The high balance on the account would come into play.

Q. Sure.

A. And more often than not I believe I would.

Q. Fair enough. Now, let's back up a second. Now we're talking about training. Okay? You said that you have been trained on contacting the clerk of court regarding land ownership. Have you received any other training regarding assets? Since your initial training have you received any other training?

A. Regarding assets in general?

Q. Regarding assets in general, yes, ma'am.

A. Yes.

Q. You have? Would you tell me about that, please?

A. In our qualification process to determine reasonable payment plan arrangements --

Q. Yes, ma'am.

A. -- we review income versus expenses.

Q. Yes, ma'am.

A. Part of reviewing income versus expenses includes actual wage income, obviously. When you're

qualifying the expenses would be mortgage, rent, car payment, insurance payment, health benefits, child support and other things that an individual would qualify as required monthly expenses and then you have a ratio of what's available to make a reasonable payment out of what's left.

Q. Okay.

A. So obviously, because of that process, you are obtaining information they own their home or they are owning it, trying to own it --

Q. Sure.

A. -- or they are paying on a vehicle, just to qualify them on that income expense ratio.

Q. Okay. So if I get a picture, if I get a picture here of the collection process, when you're dealing with a debtor you are dealing with someone who is -- obviously, you are first trying to get the payment in full. That doesn't occur, then you are falling back on a secondary position to try to determine a payment plan.

A. A reasonable payment arrangement, yes, sir.

Q. What you call a reasonable payment arrangement. You yourself are not going to just take any old payment plan?

A. No, sir.

A. No.

Q. So really the determination of personal property assets and real property, land assets, comes about during the monthly payment assessment process?

A. The initial payment process.

Q. The initial payment process. Do you have an instinct for when someone is lying?

A. Absolutely.

Q. I believe you. I really do believe you. So if you thought someone was lying -- "I'm not working. I live with my mama, and all I've got is social security." If you had the idea that they were lying, what would you do at that point? Besides refer them to legal, what would you personally do at that point?

A. At this point I put it in SA status because I get a credit report.

Q. SA status then generates a credit report?

A. Uh-huh.

Q. Okay. How long have you had the ability to put an account in SA status?

A. Twelve to eighteen months.

Q. Twelve to eighteen months? Prior to that --

A. Nope.

Q. -- you never got a credit report?

A. No. I'm sorry.

EXHIBIT "7"

ask -- when you called on the telephone did you ask debtors about their assets?

A. No.

Q. Okay. Thank you.

(Plaintiff's Exhibit No. 3 was marked for identification.)

Q. I want to hand you what's been marked as Plaintiff's Exhibit 3 and ask you if you know what that is?

A. Face sheet.

Q. Okay. For simplistic purposes can we say that the face sheet refers to activity on a debtor's account?

A. Yes.

Q. In your capacity as a collector did you enter information into a computer system?

A. Yes.

Q. And that information entered into the computer, would that be reflected on that face sheet?

A. Yes.

Q. Do you know of any other location where information that you as a collector would enter into the computer would be located other than on a face sheet?

A. No.

Q. What is the name of that debtor?

A. Matthew Ellsworth.

course of the conversation?

Q. Other than what's generally contained on the talk-off.

A. It would have been basically what was on it.

Q. What generally was on the talk-off?

A. (Witness nods head.)

Q. Okay. If you had reached Mr. Smith, what's generally your first question to Mr. Smith?

A. Find out if it is who I'm calling.

Q. How would you do that?

A. Ask him if it's Mr. Smith.

Q. What else would you have asked him?

A. If he said yes, verify that it was him.

Q. Would you have asked him his date of birth?

A. Or his social.

Q. Or his social security number?

A. Yes.

Q. If you had reached Mr. Smith would you have asked him whether he owned any automobiles?

A. No.

Q. If you had reached Mr. Smith would you have asked him if he owned any real estate?

A. No.

Q. If you had reached Mr. Smith would you have asked him if he owned any other personal property

assets?

A. No.

Q. If you had reached Mr. Smith would you have asked if he worked?

A. Yes.

Q. If he said that he did work would you call him at work?

A. Yes.

Q. If you called him at work would you have spoken with anyone other than Mr. Smith?

A. Only to leave a message for him.

Q. Only to leave a message? Would you have talked about Mr. Smith's business with any of his co-workers?

A. No.

Q. If you had reached Mr. Smith would you have asked him if he had a checking account or savings account?

A. Yes.

Q. You would have? What would have been the purpose of asking him about that?

A. To pay the bill with a check over the phone.

Q. What if Mr. Smith had told you that he did not have a checking account, would you have asked him if he had a savings account?

A. No.

Q. Would you have asked Mr. Smith if he owned any cars free and clear?

A. No.

Q. Would you have asked him if he owned any real estate free and clear?

A. No.

Q. If that information had been available to any collector would that have been entered into the computer?

MR. McGILL: I'll object to the question as to any collector. I mean, you're asking him to testify as to what --

MR. POSTON: I understand.

MR. McGILL: -- other collectors may or may not do.

MR. POSTON: I understand.

MR. McGILL: That's something that may be discretionary. Answer if you can.

BY MR. POSTON:

Q. Would you expect to see ownership of property on these notes if you were looking through there?

A. If they got the information from them, yes.

Q. Would you view the ownership of property as important information to enter in the computer?

A. Yes.

Q. Mr. Smith, have you ever had a class at Medical Data about searching for assets?

A. No.

Q. Let me go back to some general questions. Have you ever testified before?

A. No.

Q. Have you ever given a deposition?

A. No.

Q. Have you ever even been in a courtroom?

A. No.

Q. Do you ever want to be in a courtroom?

A. No.

Q. Did you ever work for any other collection companies beside Medical Data?

A. No.

Q. In your present job as research are you paid a salary or are you paid by the hour?

A. By the hour.

Q. How many hours a week do you work?

A. Forty.

Q. In your job as a collector were you paid by the hour or were -- were you paid by the hour as a collector?

A. Yes.

Q. Were you also paid a commission based upon how

say your primary goal was to get the person to pay money?

A. Yes.

Q. During your collection process were you ever trained to ask about automobiles?

A. No.

Q. During your collection process were you ever trained to ask about real estate?

A. No.

Q. And during your collection process were you ever trained to ask about personal property?

A. No.

Q. During your collection process were you ever trained to ask about checking?

A. Yes.

Q. And when you would ask them about checking what would you ask them?

A. If they have a checking account.

Q. If a debtor told you they had a checking account, what would you then say?

A. Would you like to pay it with a check.

Q. And suppose the debtor said no, what would you ask then?

A. If they could mail in a money order or --

Q. If the debtor said that, "Hey, I don't have a

checking account," were you ever trained to ask them for a savings account number?

A. No.

(Plaintiff's Exhibits No. 4 and No. 5 were marked for identification.)

MR. POSTON: I'm doing a better job of getting these introduced into evidence.

Q. I want to hand you what has been marked as Plaintiff's Exhibit Number 4, which is Leticia Andrews.

THE WITNESS: Give these to her?

MR. POSTON: Yes, please. Thank you, sir.

Q. That one is pretty short and sweet, huh?

A. Yes.

Q. Did you make contact with Mrs. Andrews by telephone?

A. No.

Q. Does it appear from the face sheet there was ever any contact made with Mrs. Andrews?

A. No.

Q. Would you pass her that exhibit? I'm going to hand you now what has been marked as Plaintiff's Exhibit 5, which is Jeffrey Dixon.

MR. POSTON: That particular face sheet will be used through some other depositions and so I'm going to ask that it not be put as part of this record

we're lawyers we call them cases. You may call them accounts. When you get a new account do you have any duties as a researcher?

A. Just to go in the hospital site and see what information there is if there is any.

Q. Do you periodically do that as well?

A. For every account.

Q. For every account you periodically go in and look for new information, is that correct?

A. Yes.

Q. When you were a collector did you ever work out payment plans?

A. Yes.

Q. Do you recall in general how that went? I know it's been six months since you've done that. What do you recall about doing payment plans?

A. If they couldn't pay the full amount, try to get what they can do over a certain period of time.

Q. And how would you get that from them?

A. They would either do a check with us or send it in.

Q. In order for them to qualify for doing a payment plan do you have to do anything to find out about their assets, what they have?

A. At the time I didn't.

Q. Well, did you ever have to ask them about what maybe their payments were for a home, that you recall?

A. Not that I recall.

MR. McGILL: Okay. That's all I have. I guess you're done.

STIPULATIONS

IT WAS STIPULATED BETWEEN counsel for the respective parties, with the consent of the witness, that reading and signing of the foregoing deposition by the witness be waived.

THEREUPON, the deposition of SHAWN SMITH, taken at the instance of the Plaintiffs, was concluded at 11:05 a.m.

EXHIBIT "8"

Q. Would you say never?

A. Never.

Q. Okay. Is that also a no-no?

A. Excuse me?

Q. I said is that also prohibited?

A. Right. We can't leave anything on the desk.

Q. Any pertinent information that you obtain from a debtor, is it noted in the computer?

A. Yes.

Q. Is there ever information stored anywhere other than in the computer?

A. No.

Q. Like is there a second computer system or a second face sheet?

A. That, I don't have knowledge of.

Q. Okay.

A. But everything gets shredded or noted in the computer.

Q. So if you receive pertinent information from a debtor, is it safe to say that you would enter it into the face sheet -- or enter it into the computer? Excuse me.

A. Yes.

Q. So, for example, anything the debtor said you would write down in notes?

A. Anything?

Q. Yes.

MR. McGILL: Are you asking if she verbatim types out a conversation?

MR. POSTON: I'm not asking --

MR. McGILL: I think the answer to that question would be no.

Q. I'm not asking you did you verbatim. I'm saying pertinent information regarding the debtor, is it written down in the notes?

A. It should be.

Q. So any relevant information pertaining to the debtor would be in the notes?

MR. McGILL: I'm going to object to the word "pertinent" because that's something that an individual would determine on an individual basis. What is pertinent to you is not pertinent to her. But, other than that objection, you can answer if you can.

A. Yes.

Q. What information might you not put into the computer?

A. If they discuss their medical --

Q. Problems?

A. -- problem, concern, I can't put that in there.

Medical Data require that you do to verify employment?

A. You can call the employer and ask for the debtor.

Q. Okay. Is there any other method by which you would verify employment?

A. No.

Q. Is that all you would do is call the employer?

A. (Witness nods head.)

Q. Would that satisfy your verification by simply calling and asking to speak to the debtor?

A. For me, yeah.

Q. What if the employer said, "I've never heard of that person," what would you say next?

A. Okay. Thank you.

Q. What would you enter into the notes if the employer said, "I've never heard of that person?"

A. No one by that name.

Q. In looking at those notes on that face sheet there, if it was discovered that Mrs. Passmore owned real estate, would that information have been written on that face sheet?

A. No.

Q. Do you personally ask the debtor whether she owns real estate?

A. No.

Q. Do you personally ask the debtor whether she owns an automobile?

MR. McGILL: And these are just general questions in every circumstance --

Q. In your collection --

MR. McGILL: -- or at any point in time in her efforts to collect?

Q. In your collection process with any debtor do you ask them do they own an automobile?

A. When we're qualifying for a payment plan there are questions that we ask to get to a reasonable payment, monthly payment from them. We're helping them.

Q. During your collection process do you ask whether they own a checking account?

A. When we take a check over the phone, yes.

Q. During your collection process do you ask if they own a savings account?

A. No.

Q. During your collection process do you ever ask the debtor, "What other types of personal property do you own?"

A. No.

MR. McGILL: Again, asking for at any point at all during any possible --

MR. POSTON: During her collection process --

MR. McGILL: -- any possible --

MR. POSTON: I'm leaving that open-ended. I'm not talking about just Mrs. Passmore. I'm asking her what she does during her collection process.

Q. If you were to call a debtor trying to collect and the debtor says, "I'm not working," do you ask them if they have any other sources of income?

A. Again, it's all so individual.

Q. Okay. Suppose a debtor tells you, "I'm not working right now and I'm living alone," would you ask her if she had any other source of income?

A. Probably not.

Q. During the payment plan process you said you'll ask them about automobile ownership?

A. No. I ask, "Do you have a car payment?" See, we're trying to work out a payment plan for them that they can work out with them.

Q. Do you have a worksheet that you fill out for a payment plan?

A. Yes.

Q. You do?

A. Yes.

Q. Is that worksheet furnished by Medical Data?

A. Yes.

Q. Is it in your collection manual?

A. No. They are on my desk.

Q. So in the payment plan that's on your desk is there a budget for you to work through in determining a payment plan? Is that -- to simplify the process that's there, do you start with income and then deduct expenses, is that --

A. Yes.

Q. -- a simplified explanation?

A. Monthly income, monthly expenses. Sometimes we break down the monthly expenses to work out a reasonable payment plan for them.

Q. When you're asking them about an automobile, do you ask them what type of automobile?

A. No.

Q. No? Do you ever ask them if they own an automobile outright?

A. No.

Q. Do you ever ask them if they own any land or other property outright?

A. No.

Q. You're simply concerned with the amount of payments that they have?

A. Utilities, groceries, insurance, mortgage.

Q. Being a bankruptcy attorney I have asked that, I don't know, several thousand times in my life. I

appreciate that. But apart from the payment plan do you ever ask or inquire about real estate ownership?

A. No.

Q. Apart from the payment plan process do you ever ask about automobile ownership?

A. Well, I say, "Do you have a car payment?" I don't put it your way, no.

Q. Like, "Do you own any cars outright?"

A. No.

Q. Do you ever ask them that?

A. No.

Q. You have never asked them that?

A. No.

Q. Apart from the payment plan process do you ever ask them if they own any other personal property?

A. No.

MR. POSTON: That's about all I have.

STIPULATIONS

IT WAS STIPULATED BETWEEN counsel for the respective parties, with the consent of the witness, that reading and signing of the foregoing deposition by the witness be waived.

THEREUPON, the deposition of DENISE BOBELAK, taken at the instance of the Plaintiffs, was concluded at 10:06 a.m.

EXHIBIT "9"

A. No.

Q. You wouldn't have to ask if they've got any sort of real property?

A. No.

Q. Or any sort of personal property?

A. No.

MR. McGILL: Okay. That's all I needed to clear up.

REDIRECT EXAMINATION

BY MR. POSTON:

Q. Would it be a requirement of Medical Data, as far as training goes, that any contact regarding personal property assets be listed on this face sheet?

MR. McGILL: Say that again.

Q. Would Medical Data require any of its collectors to list information regarding personal property assets on this face sheet if it was discussed during a collection call?

MR. McGILL: That assumes a need to request it on Boswell, but I'll let you answer the question if you can.

A. I would say yes. Every conversation, whatever is said, has to be documented.

Q. So any discussion regarding automobiles must be documented?

A. Correct.

Q. Any discussion regarding real estate must be documented?

A. Correct.

Q. Any discussion regarding employment verification must be documented?

A. Yes.

Q. Did you ever have the occasion to deal with bankruptcy accounts?

A. Meaning documenting them or personally calling?

Q. Yes, documenting.

A. Yes.

Q. As a research analyst do you get information pertaining to bankruptcies?

A. It's usually either on the account already --

Q. Okay.

A. -- or it's in the hospital files.

Q. And I guess that's really my question. If the hospital reports bankruptcy are you the person, as a researcher now, are you the person that keys the information in?

A. Yes, in the notes and also on what we call the edit screen, additional information which is on the top -- well, it's on the top of his where it says "Additional Information".

EXHIBIT "10"

03/06/2007 **Medical Data Systems, Inc. / dba Medical Revenue Services** 2:06PM

Debtor Information Face Sheet

PASSMORE, CYNTHIA F

Debtor Name	Client Code	Client Member
PASSMORE, CYNTHIA F	03590	Medical Center Enterprise

Street Address	P.O. Box, Suite Number, Mailbox Number	Telephone Number
43 SOUTHLAND TRAILOR		(334) 670-0573

City, State Zip Code	Current Employer	Employer Telephone
TROY, AL 36079-0000		

Date Of Birth	Social Security	Placement Date	Lift Days	Extension	Status	Letter Assigned	Last Activity
06/24/1964	418-06-8309	01/30/2006	1 Days	09/06/2006	Z		03/06/2007

Additional Comments: FLD CHAP 13 DT FDL 11-11-02 CS# 02-12547 ATNY MICHAEL D BROCK PH# 334-393-4357

Account N°	Service Date	Placement Date	Account Status	Amount Placed	Total Payments	Total Adjustments	Current Balance	Patient Name
E0323100026	08/19/2003	01/27/2006		$55.00	$0.00	$55.00	$0.00	PASSMORE, CYNTHIA F
E0333200036	11/28/2003	01/27/2006		$75.00	$0.00	$75.00	$0.00	PASSMORE, CYNTHIA F
E0322400161	08/12/2003	01/27/2006		$447.65	$150.00	$297.65	$0.00	PASSMORE, CYNTHIA F
Total Accounts:				**$577.65**	**$150.00**	**$427.65**	**$0.00**	

Debtor Notes

02/16/2006	Charge Status Set to RBAL	Betty Morris
02/16/2006	Debtor Status Changed From UL To P1	Betty Morris
02/16/2006	Insurance Paid Balance Due By Guarantor	Betty Morris
02/16/2006	Insurance Paid Balance Due By Guarantor	Betty Morris
02/16/2006	Checked Facility For Additional Info	Betty Morris
02/16/2006	Checked Facility For Additional Info	Betty Morris
02/16/2006	Checked Facility For Additional Info	Betty Morris
03/23/2006	Charge Status Changed From RBAL To INSX	Monica Marquez
03/23/2006	Talked To Guarantors Insurance Carrier	Monica Marquez
03/23/2006	per bcbs recorder clm pressed on 9/25/03 and 472.65 went towards	Monica Marquez
03/23/2006	pt ded amt, pt liable	Monica Marquez
04/19/2006	Letter PL1 Assigned To Debtor	Denise Bobelak
04/19/2006	Debtor Status Changed From P1 To P2	Denise Bobelak
04/19/2006	Debtor Extension Re-Assigned To 05/19/2006	Denise Bobelak
04/19/2006	No Answer At Residence	Denise Bobelak
04/20/2006	Letter PL1 Sent To The Debtor	Letter Manager
04/27/2006	Debtor Status Changed From P2 To E	Trisda Marshall
04/27/2006	Debtor Extension Re-Assigned To 05/17/2006	Trisda Marshall
04/27/2006	Return Call From Guarantor	Trisda Marshall
04/27/2006	mm gvn dbtr vrfyd dob dbtr wntd to be pt on PPLAN std that she	Trisda Marshall
04/27/2006	cld mail out first pymnt of 50.00 on 5/12/06 informd dbtr she	Trisda Marshall
04/27/2006	wld be set up on a PPLAN aftr we receieve frst pymnt	Trisda Marshall
05/08/2006	Debtor Extension Re-Assigned To 05/09/2006	Victoria Rana Williams
05/09/2006	Debtor Extension Re-Assigned To 05/31/2006	Denise Bobelak
05/09/2006	Charge Status Changed From INSX To PPLAN	Denise Bobelak
05/09/2006	Charge Status Set to PPLAN	Denise Bobelak
05/09/2006	Charge Status Set to PPLAN	Denise Bobelak
05/09/2006	Payment Arrangement Setup For $50.00 Every 30 Days	Denise Bobelak
05/09/2006	Letter PPLAN Assigned To Debtor	Denise Bobelak
05/09/2006	Debtor Status Changed From E To PPLAN	Denise Bobelak
05/09/2006	Debtor Extension Re-Assigned To 05/09/2006	Denise Bobelak
05/16/2006	Debtor Extension Re-Assigned To 06/05/2006	Denise Bobelak
06/06/2006	Letter PPLAN Sent To The Debtor	Letter Manager
06/08/2006	Debtor Extension Re-Assigned To 06/28/2006	Denise Bobelak
06/15/2006	Debtor Extension Re-Assigned To 07/15/2006	Victoria Rana Williams
07/05/2006	No Answer At Residence	Belinda Anderson
07/10/2006	Letter PPLAN Sent To The Debtor	Letter Manager
07/17/2006	Debtor Extension Re-Assigned To 07/31/2006	Belinda Anderson
07/17/2006	Talked To Guarantor At Residence	Belinda Anderson
07/17/2006	Clld askd fr debtor sh answd ph sh identdf hrslf as debtor I	Belinda Anderson

03/06/2007 **Medical Data Systems, Inc. / dba Medical Revenue Services** 2:06PM

Debtor Information Face Sheet

PASSMORE, CYNTHIA F

07/17/2006	sd whr i ws cling frm ph discond convrs ended	Belinda Anderson
08/01/2006	Talked To Guarantor At Residence	Belinda Anderson
08/01/2006	spk wh debtor sh identfd hrslf i mmd hr sd ths cll was a followup	Belinda Anderson
08/01/2006	cll per pmt pln agred sd sh forgot bt wil snd pmyt in nx wk	Belinda Anderson
08/01/2006	8-4-06 i sd i'll do another follow up cll per tht pymt of $50.00	Belinda Anderson
08/01/2006	convrs ended	Belinda Anderson
08/07/2006	Debtor Status Changed From PPLAN To DFLT	Medical Data Administrator
08/07/2006	Charge Status PPLAN Removed From Account	Medical Data Administrator
08/08/2006	Letter PPLAN Not Sent: Debtor Defaulted On Payment Plan	Letter Manager
08/11/2006	No Answer At Residence	Belinda Anderson
08/18/2006	Letter DEFAULT Assigned To Debtor	Belinda Anderson
08/18/2006	Debtor Status Changed From DFLT To P2	Belinda Anderson
08/18/2006	Debtor Extension Re-Assigned To 09/08/2006	Belinda Anderson
08/18/2006	No Answer At Residence	Belinda Anderson
08/24/2006	Letter DEFAULT Sent To The Debtor	Letter Manager
09/05/2006	Debtor Status Changed From P2 To E	Theresa Turner
09/05/2006	Debtor Extension Re-Assigned To 09/06/2006	Theresa Turner
09/07/2006	Guarantor Bankrupt	Theresa Turner
09/07/2006	FLD CHAP 13 DT FDL 11-11-02 CS# 02-12547 ATNY MICHAEL D BROCK	Theresa Turner
09/07/2006	PH# 334-393-4357	Theresa Turner
09/07/2006	Debtor Status Changed From E To Z	Theresa Turner
09/07/2006	Charge Status Set to BNK	Theresa Turner
09/07/2006	Charge Status Set to BNK	Theresa Turner
09/07/2006	Charge Status Set to BNK	Theresa Turner
09/07/2006	Cancellation Request Made On This Account	Medical Data Administrator
09/07/2006	Cancellation Request Made On This Account	Medical Data Administrator
09/07/2006	Cancellation Request Made On This Account	Medical Data Administrator
03/06/2007	Debtor Information Face Sheet Requested	Nancy Matos

EXHIBIT “11"

9. MDS objects to Plaintiff's Requests, including the definition and instructions, to the extent they purport to impose obligations upon MDS greater or different than those imposed by the Federal Rules of Civil Procedure or this Court and/or attempt to give meaning to terms beyond those terms' common and ordinary meaning.

10. MDS objects to Plaintiff's Requests to the extent that they seek a description of information or documents prepared by or for experts in a manner contrary to the Federal Rules of Civil Procedure.

SPECIFIC OBJECTIONS AND RESPONSES TO PLAINTIFF'S REQUESTS

1. That Defendant, Medical Data Systems, Inc. d/b/a Medical Revenue Services, Inc. (hereinafter, "Medical Revenue"), is a Florida corporation.

RESPONSE NO. 1:

MDS admits to the information stated in Request to Admit No. 1.

2. That Defendant's principal place of business is located at 2001 9th Avenue, Suite 312, Vero Beach, Florida 32960.

RESPONSE NO. 2:

MDS admits to the information stated in Request to Admit No. 2.

3. That Defendant's principal purpose is to collect debts using the mail and telephone.

RESPONSE NO. 3:

MDS admits it is a debt collector within the meaning of the term under the Fair Debt Collection Practices Act. MDS denies all other inferences or allegations included in Plaintiff's Request No. 3.

4. That Defendant regularly attempts to collect debts alleged to be due another.

RESPONSE NO. 4:

MDS admits it is a debt collector within the meaning of the term under the Fair Debt Collection Practices Act. MDS denies all other inferences or allegations included in Plaintiff's Request No. 4.

5. The Defendant, Medical Revenue, is a debt collector as defined by the FDCPA, 15 U.S.C. §1692a(6).

RESPONSE NO. 5:

MDS admits Plaintiff's Request No. 5.

6. That the debt allegedly owed by Plaintiff to Medical Center Enterprise is a consumer debt as defined by the FDCPA, 15 U.S.C. §1692a(3&5).

RESPONSE NO. 6:

MDS admits Plaintiff's Request No. 6.

7. That Plaintiffs alleged debt to Medical Center Enterprise was for personal, family, or household purposes.

RESPONSE NO. 7:

MDS admits Plaintiff's Request No. 7.

8. That, in approximately April, 2006, the Defendant transmitted a collection letter, attached hereto as Exhibit "A," to Plaintiff.

EXHIBIT "12"

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA

In re

JAMES R. CAMBRON and
WENDY L. CAMBRON,

Debtors.

Case No. 05-11879
Chapter 7

WILLIAM C. CARN, III,
BANKRUPTCY TRUSTEE,

Plaintiff,

v.

MEDICAL DATA SYSTEMS, INC.,

Defendant.

Adv. Pro. 06-1057

WILLIAM C. CARN, III,
BANKRUPTCY TRUSTEE,

Plaintiff,

v.

MEDICAL DATA SYSTEMS, INC.,

Defendant .

Adv. Pro. 06-1058

REPORT AND RECOMMENDATION OF THE UNITED STATES BANKRUPTCY JUDGE WILLIAM R. SAWYER

These consolidated Adversary Proceedings came before the Court for trial on March 15, 2007. Plaintiff William C. Carn, III, the Trustee in bankruptcy, was present by counsel David G. Poston and Michael Brock. Defendant Medical Data Systems, Inc., was present by its Chief Operating Officer Gary Ball and by counsel Russell McGill. The parties have filed briefs which

the undersigned has found helpful. (Adv. Pro. No. 06-1057, Docs. 30, 32). The Court heard evidence and the arguments of counsel and took the matter under advisement.

I. PROPOSED FINDINGS OF FACT

On April 19, 2005, Medical Revenue Services, a unit of Defendant Medical Data Systems, Inc., wrote James R. Cambron a letter demanding payment of medical bills totaling $1,875.59. (Pl.'s Ex. A).[1] Two of the five individual debts allegedly owed were for services rendered at Flowers Hospital in March of 1997, more than eight years prior to the date of the letter. This is significant in that the statute of limitations to collect an unsecured debt in Alabama is only six years. Thus, of the $1,875.59 allegedly owed, $1,694.23 was uncollectible because the statute of limitations had expired.

On May 24, 2005, Medical Revenue Services wrote Wendy L. Cambron an almost identical collection letter as that sent to James Cambron. The letter addressed to Wendy Cambron demanded payment of a $175.00 medical bill. (Pl.'s Ex. B). The debt was for services allegedly rendered at Flowers Hospital on August 27, 2003.

Both letters contained the same opening paragraph. The first paragraph states as follows:

> Medical Revenue Service is a collection agency, retained to represent the below named creditor. Since you have failed to pay this obligation in full, we now must determine your ability to repay this debt. The information we may be seeking, if available, to determine what further collection effort to take is:
>
> 1.) Real estate ownership/equity
> 2.) Personal property assets
> 3.) Savings, checking balances
> 4.) Your source of income
> 5.) Automobile ownership
> 6.) Verification of employment

[1] The full text of the letters are provided in an Appendix to this Memorandum.

(Pl.'s Exs. A, B).

The Plaintiff contends that this communication is misleading in that it implies that nonpayment of the bill will result in the seizure of property or garnishment of wages. As the creditor had not obtained judgment on the debts in question, and as the debts were unsecured obligations, the creditor had no immediate right to take any action with respect to the Cambrons' wages or property. Indeed, about 90% of the amount allegedly owed was more than six years old and therefore, uncollectible as a matter of law. With respect to the 10% of the debt which was not stale, the evidence showed that Medical Data had no intention to take that action. Indeed, the evidence is clear that it was the intention of Medical Data to attempt to make telephonic contact with the Cambrons and press them to pay these debts. If those efforts were unsuccessful, the debt was referred back to the original creditor, which in this case was Flowers Hospital.

Medical Data has its principal office in Sebring, Florida, and describes itself as a "secondary" debt collector. That is, it does not receive referrals of debts until collection has first been attempted by another agency. Its efforts to collect debts appear to consist of two things. First, it sends a letter and then it follows up with telephone calls. Gary Ball, Medical Data's Chief Operating Officer, testified that they would not send the letters unless it was required by the Fair Debt Collection Practices Act, as he feels that the most effective means of collecting debts is by way of the telephone.

In response to questions about collecting a debt after expiration of the statute of limitations, Ball testified that he felt that the debtors have a moral obligation to repay a debt which survives the statute of limitations. Ball does not believe that he has any obligation to

disclose the fact that the debts he is attempting to collect are beyond the statute of limitations. Nor apparently, does he believe that he must tell debtors that he may not seize their property until after he takes judgment, an action he has no intention to take.

The question of whether the first paragraph of the letters in question is deceptive is a close one. There is nothing in the letters that is demonstrably false. Ball's claim that information on the debtors' wages and property is needed to evaluate further collection efforts is not, in and of itself, wholly implausible. However, there are several troublesome facts here. Medical Data did not order credit reports or consult property records, state motor vehicle records, or other sources which would have provided the same information. In the experience of the undersigned, financially stressed individuals frequently do not voluntarily provide such information unless legally obligated to do so. Moreover, when such information is provided by an uncounseled debtor, the information is frequently incomplete or inaccurate. Ball testified that Medical Data mails approximately 1.8 million such letters each year. However, Medical Data provided no evidence as to how often debtors respond to such letters with accurate information. Given the evidence adduced at trial, it strains credibility to believe that the true purpose of the language in question is to obtain accurate information on a debtors' assets and wages. Rather, it appears that the purpose, and surely the effect of these letters, is to coerce payment by giving a false impression that the debtors' wages and assets are in jeopardy.

II. PROPOSED CONCLUSIONS OF LAW

A. Procedural Setting

This is an action under the Fair Debt Collection Practices Act. 15 U.S.C. § 1692k. The Plaintiff seeks damages in the amount of $1,000.00 in each Adversary Proceeding, plus attorney's fees and costs. 15 U.S.C. § 1692k(a).

James R. Cambron and Wendy L. Cambron filed a joint petition in bankruptcy pursuant to Chapter 7 of the Bankruptcy Code on September 8, 2005. (Case No. 05-11879, Doc. 1). The claims of James and Wendy Cambron are property of their bankruptcy estates. 11 U.S.C. § 541. As these claims are property of the estate, this Court has jurisdiction to hear these Adversary Proceedings pursuant to 28 U.S.C. § 1334. These claims are "related to" the Cambrons' bankruptcy filing. William C. Carn, III, the Chapter 7 Trustee, has been substituted as named Plaintiff for James and Wendy Cambron.[2]

In general terms, an action is a core proceeding if it is one that could not be brought but for the existence of a bankruptcy case. 28 U.S.C. § 157(b); see also, The Whiting-Turner Contracting Co. V. Electric Machinery Enterprises, Inc. (In re Electric Machinery Enterprises, Inc.), __ F.3d __ , 2007 WL 548781 (11th Cir. Feb. 23, 2007) (holding that a proceeding is core "if the proceeding is one that would arise only in bankruptcy"). As these Fair Debt Collection Practices Act claims do not depend on a bankruptcy filing for their existence, these are not core proceedings. As these are non-core proceedings, the undersigned Bankruptcy Judge makes

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[2] The Court conditionally dismissed Adversary Proceeding No.06-1057 on the grounds that it had not been brought by the proper party in interest. (06-1057, Docs. 9, 10). In response, the Chapter 7 Trustee William C. Carn, III, entered the case as Plaintiff. (06-1057, Doc. 11). As the same reasoning applies to Adversary Proceeding No. 06-1058, Trustee Carn is likewise substituted as named Plaintiff in Adversary Proceeding No. 06-1058.

proposed findings of fact and conclusions of law in accordance with the provisions of 28 U.S.C. § 157(c)(1) and directs the Clerk of the Bankruptcy Court to file the same with the District Court. By way of a separate order, a schedule for the filing of objections pursuant to Rule 9033, FED. R. BANKR. P. is established.

B. FDCPA Claims

The Plaintiff makes claims under both 15 U.S.C. § 1692e(5) and (10). While the same set of facts support each claim, the undersigned with analyze the claims separately. Although the Court concludes that the Plaintiff has established both claims, it will discuss the e(10) claim first because, in its view, it is the stronger claim.

1. The § 1692e(10) Claim[3]

Congress has determined that "there is abundant evidence of the use of abusive, deception, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, of the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a). Congress further stated that "it is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e). In furtherance of this purpose, Congress enacted the "Fair Debt Collection Practices Act," which provides, in part, as follows:

---

[3] For purposes of clarity, the claims made pursuant to 11 U.S.C. § 1692e(10) will be referred to as the e(10) claims, and the claims made pursuant to 11 U.S.C. § 1692e(5) will be referred to as the e(5) claims. The e(5) claims are considered in Part II(B)(2) below.

> A debt collector may not use any false, deception, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> * * *
>
> (10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

15 U.S.C. § 1692e.

The issue here is whether the letters in question are deceptive. The United States Court of Appeals for the Eleventh Circuit has held that courts making this determination should use the "least sophisticated consumer" standard. Jeter v. Credit Bureau, Inc., 760 F.2d 1168 (11th Cir. 1985).

> That law was not "made for the protection of experts, but for the public–that vast multitude which includes the ignorant, the unthinking and the credulous," and the "fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced.

Id. at 1172-73 (internal citations omitted); see also, Kimber v. Fed. Financial Corp., 668 F.Supp. 1480, 1487-89 (M.D. Ala. 1987) (Thompson, J.) (holding that bringing suit to collect a debt barred by the statute of limitations was deceptive within the meaning of the Fair Debt Collection Practices Act); Thompson v. D.A.N. Joint Venture III, L.P., 2007 WL 496754 (M.D. Ala. Feb. 13, 2007) (Moorer, Mag. J.) (to same effect).

The Plaintiff argues that the language in question is deceptive because it falsely implies that the debtors' assets and wages may be in jeopardy. They argue that the purpose of this language is to unlawfully coerce payment. Gary Ball testified that the purpose of this language

was to attempt to obtain information on the debtors, reasoning that debtors who are employed and have assets are more likely to pay their debts. The undersigned finds that the language in question is deceptive and that the explanation advanced by Medical Data is unconvincing. An unsophisticated consumer would be deceived by the language in the letters.

A debtor with competent counsel would know that a debt is uncollectible if the statute of limitations has run. A counseled debtor would also know that the holder of an unsecured claim may not seize property until judgment has been taken in a court of law. Thus, the ambiguity in the first paragraph of the collection letters would cause no harm to a properly counseled debtor. However, the law is clear that the Court, in determining whether a given communication is misleading, for purposes of an e(10) claim, must apply the "least sophisticated consumer" standard. Applying that standard here, the Court finds that the communication from Medical Data is misleading. An unsophisticated consumer would conclude that his wages and property are in jeopardy and for that reason, would be coerced into paying the debt in violation of the Fair Debt Collection Practices Act.

Medical Data advanced an argument that the language in question is not deceptive. Ball testified that the information as to wages and property is useful to Medical Data in its determination as to what further action to take. If a debtor has a job and property, he is more likely to pay the debt and for that reason should be further pressed to pay. This reasoning is circular. A debtor without income and without property would not feel coerced to pay as he has nothing to lose. Indeed, it is only those debtors with jobs and property who Medical Data would seek to mislead.

The Plaintiff argues that Medical Data's claim–that they need the information for their collection purposes–is without merit. Ball admitted that they had not consulted credit reports or property records, nor had they consulted any other records which might have provided the information requested in the first paragraph of the letter in question. That Medical Data had not taken any such action suggests that their claim is a pretext and that their true purpose was to unlawfully coerce payment.

2. The § 1692e(5) Claim

Plaintiff also alleges a violation of 15 U.S.C. § 1692e(5), which prohibits a debt collector from threatening to take action which cannot legally be taken. As the letters in question do not, strictly speaking, threaten anything, there is no express violation of this provision. However, the overarching problem here is one of deception and not of express threats to take action. For this reason, the undersigned is of the view that the claims are better considered under e(10) than under e(5). It should also be noted that the Eleventh Circuit does not apply the "least sophisticated consumer" standard to e(10) claims and for this reason, the Plaintiff's burden is somewhat heavier for an e(5) claim than is the case for an e(10) claim.

While the undersigned is of the view that the Plaintiff's claims here are best cast in terms of e(10), the question remains whether the Plaintiff has also made out a claim under e(5). There is case law for the proposition that deceptive language in a collection letter which suggests that such action will be taken may constitute such a violation. Mailloux v. Arrow Financial Services, LLC, 204 F.R.D. 38, 41-42 (E.D.N.Y. 2001) (certifying class status where a collection letter deceptively implied that collection action which could not lawfully be taken would be taken and finding a violation of § 1692e(5)). The facts in Mailloux are similar to the facts here in that the

letter inquired into the debtor's income, checking account balances, employment, real estate ownership, and automobile ownership. The court in Mailloux found that letter, which was very similar to the letters here, to be in violation of e(5). Therefore, the undersigned concludes, in the alternative, that the evidence establishes a violation of § 1692e(5), as well as a violation of e(10).

C. Damages

Having found violations of the Fair Debt Collection Practices Act, the Court should next consider an award of damages. As the Plaintiff does not request actual damages, none are awarded. See 15 U.S.C. § 1692k(a)(1) (allowing an award of actual damages). In addition, the Court may award "such additional damages as the court may allow, but not exceeding $1,000." 15 U.S.C. § 1692k(a)(2)(A). Having heard the evidence and having considered the arguments of counsel, the Court is of the view that an award of damages in the amount of $1,000.00 for each claim is appropriate, for a total of $2,000.00. In other words, the claim originally held by James Cambron and the claim originally held by Wendy Cambron are allowed separately. It further appears that an award of attorney's fees is appropriate. See 15 U.S.C. § 1692k(a)(3).

III. CONCLUSION

Having considered the evidence, the undersigned finds that the language in question in the letters, applying the least sophisticated consumer standard, is deceptive within the meaning of § 1692e(10). The effect of the subject language is to create apprehension that the debtors' assets and wages are in jeopardy and thereby unlawfully coerce payment of a debt. It is recommended that judgment be entered in favor of the Plaintiff in the amount of $1,000.00 each for each of two claims, for a total of $2,000.00 In addition, it is further recommended that

Plaintiff be awarded attorney's fees. The undersigned will order Plaintiff's counsel to file an Affidavit in support of their claim for attorney's fees within 15 days. Defendant will be given 15 days to respond.

Done this the 5th day of April, 2007.

/s/ William R. Sawyer
United States Bankruptcy Judge

Medical Revenue Services
P.O. Box 1149
Sebring FL 33871

RETURN SERVICE REQUESTED
04/19/2005

med9axA12DP0A107KE+014004

JAMES R CAMBRON
PO BOX 464
DALEVILLE AL 36322-0464

CHECK HERE IF ADDRESS OR INSURANCE INFORMATION IS INCORRECT AND INDICATE CHANGE ON REVERSE SIDE

Reference
F9708100109

Total Amount Due
$1874.59

Toll Free Number
(800) 315-6050

CHECK CARD USING FOR PAYMENT

CARD NUMBER

AMOUNT | EXP. DATE

SIGNATURE

MAKE CHECK PAYABLE AND REMIT TO:

Medical Revenue Services
PO BOX 1149
SEBRING FL 33871-1149

DETACH HERE AND RETURN TOP PORTION WITH YOUR PAYMENT

Medical Revenue Service is a collection agency, retained to represent the below named creditor. Since you have failed to pay this obligation in full, we now must determine your ability to repay this debt. The information we may be seeking, if available, to determine what further collection effort to take is:

1.) Real estate ownership/equity
2.) Personal property assets
3.) Savings, checking balances
4.) Your source of income
5.) Automobile ownership
6.) Verification of employment

Unless you notify this office within thirty (30) days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid. If you notify this office in writing within thirty (30) days from receiving this notice, this office will: obtain verification of the debt or obtain a copy of a judgement and mail you a copy of such judgement or verification. If you request this office in writing within thirty (30) days after receiving this notice, this office will provide you with the name and address of the original creditor, if different from the current creditor.

Please make your check or money order payable to Medical Revenue Service. In order to assure proper credit to your account, include the reference number with your payment. We also accept "check by telephone" for your convenience. If you have any questions, you may contact an account representative at the above listed phone number.

Pursuant to Section 807(11) FDCPA, this communication is from a debt collector and is an attempt to collect a debt. Any further information obtained will be used for that purpose.

A. U. Clancy
Collection Department

AUC/tb

Account #	Client Name	Service Date	Balance	Patient Name
F9708500163	Flowers Hospital	03/26/1997	307.68	Lehr, Timmy J
F9708100109	Flowers Hospital	03/22/1997	1386.55	Lehr, Timmy J
F0307000545	Flowers Hospital	03/13/2003	58.77	Cambron, James R
F0402500112	Flowers Hospital	01/25/2004	55.74	Cambron, James R
F0402400129	Flowers Hospital	01/24/2004	65.85	Cambron, James R

TOTAL BALANCE: $1874.59

PLAINTIFF'S EXHIBIT 4

PL1

Medical Revenue Services
P.O. Box 1149
Sebring FL 33871

RETURN SERVICE REQUESTED
05/24/2005

medTaxA130XCA1ODJV.007736

WENDY L CAMBRON
PO BOX 464
DALEVILLE AL 36322-0464

Reference
F0323900637

Total Amount Due
$175.00

Toll Free Number
(800) 315-6050

CHECK CARD USING FOR PAYMENT

CARD NUMBER

AMOUNT | EXP. DATE

SIGNATURE

MAKE CHECK PAYABLE AND REMIT TO:

Medical Revenue Services
PO BOX 1149
SEBRING FL 33871-1149

CHECK HERE IF ADDRESS OR INSURANCE INFORMATION IS INCORRECT AND INDICATE CHANGE ON REVERSE SIDE

Page 1 of 1

DETACH HERE AND RETURN TOP PORTION WITH YOUR PAYMENT

Medical Revenue Service is a collection agency, retained to represent the below named creditor. Since you have failed to pay this obligation in full, we now must determine your ability to repay this debt. The information we may be seeking, if available, to determine what further collection effort to take is:

1.) Real estate ownership/equity
2.) Personal property assets
3.) Savings, checking balances
4.) Your source of income
5.) Automobile ownership
6.) Verification of employment

Unless you notify this office within thirty (30) days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid. If you notify this office in writing within thirty (30) days from receiving this notice, this office will: obtain verification of the debt or obtain a copy of a judgement and mail you a copy of such judgement or verification. If you request this office in writing within thirty (30) days after receiving this notice, this office will provide you with the name and address of the original creditor, if different from the current creditor.

Please make your check or money order payable to Medical Revenue Service. In order to assure proper credit to your account, include the reference number with your payment. We also accept "check by telephone" for your convenience. If you have any questions, you may contact an account representative at the above listed phone number.

Pursuant to Section 807(11) FDCPA, this communication is from a debt collector and is an attempt to collect a debt. Any further information obtained will be used for that purpose.

A. U. Clancy
Collection Department

AUC/tb

Account #	Client Name	Service Date	Balance	Patient Name
F0323900637	Flowers Hospital	08/27/2003	175.00	Cambron, Wendy L

TOTAL BALANCE: $175.00

.10
.00
75
150
1-8

PLAINTIFF'S EXHIBIT B

PL1

EXHIBIT "13"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

IN RE:	
JAMES R. CAMBRON and WENDY L. CAMBRON	1:07-cv-00369-WHA Case No. 05-11879 Chapter 7
Debtors.	
WILLIAM C. CARN, III, BANKRUPTCY TRUSTEE,	Adv. Pro. 06-1057
Plaintiff,	
v.	
MEDICAL DATA SYSTEMS, INC.,	
Defendant.	

MEMORANDUM OPINION AND ORDER

I. PROCEDURAL HISTORY

These causes are before the court on a Report and Recommendation ("R&R") of the Chief United States Bankruptcy Judge pursuant to 28 U.S.C. § 157(c)(1)(2006):

> A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

The bankruptcy judge consolidated and heard two non-core adversary proceedings which were related to a case under Title 11 pending in his court. Following an evidentiary hearing, he

entered his Report and Recommendation, with proposed findings of fact and conclusions of law. Objections were filed by the Defendant.

The court has considered the proposed findings and conclusions and has reviewed de novo those matters to which the Defendant has timely and specifically objected. The court finds no reason to take additional evidence, and has conducted the de novo review upon the record, including a review of a transcript of the hearing before the bankruptcy judge. FED. R. BANKR. P. 9033(d);

II. FACTS

On April 19, 2005, Medical Data Systems, Inc., d/b/a Medical Revenue Services (hereinafter "MDS"), wrote James R. Cambron a letter regarding his medical debt totaling $1,875.59. (Pl's. Ex. A). Two of the five debts listed were for services allegedly rendered at Flowers Hospital in March 1997, more than eight years prior to the date of the letter. The statute of limitations for collection of unsecured debt in Alabama is only six years. ALA. CODE § 6-2-34 (1975). Of the $1,875.59 allegedly owed, over 90% of the total debt was time-barred by the statute of limitations. On May 24, 2005, MDS sent an almost identical collection letter to Wendy L. Cambron regarding her medical debt of $175.00 for services allegedly rendered at Flowers Hospital on August 27, 2003. (Pl's Ex. B).

Both letters contained the same opening paragraph:

> Medical Revenue Service is a collection agency, retained to represent the below named creditor. Since you have failed to pay this obligation in full, we now must determine your ability to repay this debt. The information we may be seeking, if available, to determine what further collection effort to take is:
>
> 1.) Real estate ownership/equity
> 2.) Personal property assets
> 3.) Saving, checking balances
> 4.) Your source of income
> 5.) Automobile ownership
> 6.) Verification of employment

(Pl.'s Exs. A, B).[1]

The sole issue decided today is whether this language violates the Fair Debt Collection Practices Act ("FDCPA"), which prohibits, *inter alia*, the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. Section 1692e then enumerates an expressly non-exhaustive list of examples, including "[t]he threat to take any action that cannot be legally taken or that is not intended to be taken," § 1692e(5), and "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." § 1692e(10). Plaintiff contends that the language violates subsections 1692e(5) and e(10), and therefore, as to each debtor, plaintiff seeks statutory damages in the amount of $1,000.00, plus attorney's fees and costs, for each violation. § 1692k.

The Report and Recommendation found that the letters deceptively implied to the "least sophisticated consumer" that "the debtors' assets and wages may be in jeopardy" and therefore they violated § 1692e(10). *R&R* at 7-8. It found as a fact the defendants intended to take no action other than telephone calls to the Cambrons. It further found that the same language suggested action which could not lawfully be taken, which constituted a threat violating § 1692e(5). *Id.* at 9-10 (*citing Mailloux v. Arrow Fin. Servs., LLC*, 204 F.R.D. 38, 41-42 (E.D.N.Y. 2001)).

The Defendant filed timely Objections to the Report and Recommendation, to which the Plaintiff timely responded. FED. R. BANKR. PRO. 9003(b). The Defendant then filed a Reply to the Plaintiff's Response to the Defendant's Objections (hereinafter "Defendant's Reply") at which time the Plaintiff asked for leave to respond to the Defendant's Reply. Rather than strike Defendant's Reply for exceeding the number of filings provided for under Rule 9003(b), the court accepted the

[1]The complete letters are attached as an Appendix to this Memorandum Opinion and Order.

Defendant's Reply and granted Plaintiff leave to file its second response (hereinafter "Plaintiff's Surreply"). Defendant's motion for leave to file an additional response to the Plaintiff's Surreply was denied.

For the reasons stated below, upon an independent evaluation and *de novo* review, the court finds that the bankruptcy judge's Recommendation is due to be adopted as modified herein.

II. STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 157(c)(1), "any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected." 28 U.S.C. § 157(c)(1); *see also Williford v. Funderburk (In re Williford)*, 22 Fed. Appx. 843, 844 (11th Cir. Mar. 13, 2007) (per curiam).

III. DISCUSSION

A. Legal Background and Applicable Standards

Congress enacted the FDCPA to "eliminate abusive debt collection practices by debt collectors," 15 U.S.C. § 1692(e), noting that "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." § 1692(a); *see also Jeter v. Credit Bureau, Inc.*, 760 F. 2d 1168, 1173-74 (11th Cir. 1985); *Ferguson v. Credit Management Control, Inc.*, 140 F. Supp. 2d 1293, 1297 (M.D. Fla. 2001). The FDCPA is a strict liability statute. *Ferguson*, 140 F. Supp. 2d at 1297; *Kaplan v. Assetcare, Inc.* 88 F. Supp. 2d 1355, 1361-62 (S.D. Fla. 2000); *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60, 63 (2d Cir. 1993). Further, a single violation of § 1692e is sufficient to establish civil liability. *See 15 U.S.C. § 1692k(a).*

Plaintiff alleges that the identical language in defendant's debt collection letters violates both 15 U.S.C. § 1692e(5) ("e(5) violation") and 15 U.S.C. § 1692e(10) ("e(10) violation"). As noted earlier, subsection e(5) prohibits "[t]he threat to take any action that cannot legally be taken *or* that is not intended to be taken," whereas subsection e(10) prohibits "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." 15 U.S.C. §§ 1692e(5) (emphasis added), 1692e(10) respectively.

In *Jeter*, the Eleventh Circuit adopted the "least sophisticated consumer" standard for determining "deception" under the FDCPA, including e(10) and one of two enumerated e(5) violations. 760 F.2d at 1175. In other words, courts should make FDCPA determinations in accordance with its purpose, "made [not] for the protection of experts, but for the public - that vast multitude which includes the ignorant, the unthinking and the credulous." *Id.* at 1172-73 (internal citations omitted). The lens of the "least sophisticated consumer" still "preserve[s] the concept of reasonableness" for an individual who can "possess a rudimentary amount of information about the world and a willingness to read a collection notice with some care." *Clomon v. Jackson*, 988 F.2d 1314, 1319 (2d Cir. 1993). Nevertheless, the fact that "a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced." *Jeter* at 1173 (internal citations and quotations omitted).

The *Jeter* court carved an exception from the "least sophisticated consumer" standard for the second "unintended action" prong of e(5):

> The . . . issue is simply whether or not [defendant] *intended* to take the action threatened . . . requir[ing] proof of a fact which amounts to a *per se* violation of § 1692e. The sophistication, or lack thereof, of the consumer is [therefore] irrelevant

> to whether [defendant] 'threat[ened] to take any action . . . that [was] not intended to be taken.'

Id. at 1175.

District courts within the Eleventh Circuit have confirmed the application of the "least sophisticated consumer standard" to the first ("illegal threats") but not second ("unintended threats") prong of § 1692e(5). *Compare Ferguson*, 140 F. Supp. 2d at 1299 (applying standard to threats which "could not legally be taken") *with Rivera v. Amalgamated Debt Collection Servs.*, 462 F. Supp. 2d 1223, 1227 (S.D. Fla. 2006) (noting application of standard for e(10) violations but citing *Jeter* for "unintended action" threats exception). In the Eleventh Circuit, therefore, the "least sophisticated consumer" standard shall be applied when determining violations of e(10) and threats of illegal action under e(5), but not threats of unintended action under e(5), because the existence of the intent to perform the action threatened is a question of fact, and threatening action with no intent to take it is a *per se* violation.

One final dispute with respect to standards involves the interrelationship between § 1692e(5) and § 1692e(10). Defendant MDS claims that e(10) is dependent on e(5), such that finding no illegal or unintended threat under e(5) precludes the possibility of finding deception under e(10). *See Obj. to R&R* at 3 (*citing Robinson v. Transworld Systems, Inc.*, 876 F. Supp. 385, 393 (N.D.N.Y. 1995) ("We already have ruled that there are no Section 1692e(5) violations because [defendant] has not threatened action that it did not intend to take. Therefore, these same statements cannot violate Section 1692e(10) as false representations or deceptive practices."). The holding of *Robinson*, however, is more limited. The facts and circumstances of *Robinson* rendered e(10) dependent on e(5) because the court found that the defendant had clearly threatened both legal and intended action, and the plaintiff's basis for deception under e(10) was

that the same statement threatened action it did not intend to take. *Id.* Because the same action was legal, intended, and indeed clearly threatened, the *Robinson* court was quickly noting in shorthand that there was no possibility of misleading, and thus no need for discussion of e(10). *Id.*

This holding does not, however, render e(10) dependent on e(5) in every situation, and they should be evaluated separately and independently. One could conceivably use "deceptive means to collect or attempt to collect any debt" under e(10) without making any threats under e(5), or any threats whatsoever. That the Eleventh Circuit applies a different standard, discussed *supra*, for e(10) and half of e(5) only bolsters this conclusion. So does the fact that many other cases evaluate the two claims separately and distinctly. *See United States v. Nat'l Financial Services, Inc.* 98 F.3d 131, 135-39 (4th Cir. 1996); *Withers v. Eveland*, 988 F. Supp. 942, 946-47 (E.D.Va. 1997); *Davis v. Commercial Check Control, Inc.*, No. 98 C 631, 1999 WL 89556, at *3-4 (N.D. Ill. 1996); *Raimondi v. McAllister & Associates, Inc.*, 50 F. Supp. 2d 825, 827 (N.D. Ill. Feb. 16, 1999); *Ferguson*, 140 F. Supp. 2d at 1299-1303 (M.D. Fla. 2001). Finally, further evidence of the separate nature of the two claims lies in the FTC commentary, which states that § 1692e(10) is "particularly broad and encompasses virtually every violation, including those not covered by the other subsections." Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097, 50105 (December 13, 1988). Although the two subsections therefore warrant independent analyses under different standards, this court adopts the bankruptcy judge's findings of violations of both e(5) and e(10), as modified herein.

B. 15 U.S.C. § 1692e(5) violation

MDS argues that its letters did not constitute "threats." The FDCPA does not define a "threat" for purposes of § 1692e(5). The court in *Ferguson* notes its definition as "a communicated intent to inflict harm or loss on another or on another's property . . . [or] an indication of an approaching menace [such as] the threat of bankruptcy." 140 F. Supp. 2d at 1293 n.11 (*quoting* Black's Law Dictionary 1289-90 (7th ed. 1999)). It then lists several examples of communications that courts have found to be "threatening communications" under the statute, including among them (1) threats to sue, (2) threats to garnish wages and/or seize assets, (3) threats to contact the debtor's neighbors and/or employer, and (4) threats to investigate the debtor's employment. *See id.* at 1299-1300 (internal citations omitted).

The bankruptcy judge, while noting that the letters "do not, strictly speaking, threaten anything," correctly noted that "the overarching problem . . . is one of deception and not of *express* threats to take action." *R&R* at 9 (emphasis added). While e(10) may prohibit general deception, e(5) more specifically prohibits threats, express or implied, of illegal or unintended action. In *Nance v. Friedman,* for example, the Northern District of Illinois denied summary judgment for the defendant under e(5), holding that even if the letter correctly indicated that the attorney was authorized to sue, and did not expressly threaten litigation, the letters falsely suggested that litigation was imminent, and that an "unsophisticated consumer – indeed even a sophisticated one – would regard this letter [as an implication] both that the attorney had been authorized to file a lawsuit and as actually threatening imminent litigation." No. 98 C 6720, 2000 WL 1700156, at *2 (N.D. Ill. Nov. 8, 2000); *see also Newman v. Checkrite California, Inc.*, 912 F. Supp. 1354, 1380 (E.D. Cal. 1995) (letter *suggesting* that suit was imminent violated § 1692e(5) because sender was not in position to file suit imminently).

The defendant's citation of *Robinson* for the proposition that "[g]enerally the threat to take an action that will not or cannot be taken must be explicit" is both unpersuasive and an overstatement. *Obj. to R&R* at 4. (*citing Robinson,* 876 F. Supp. at 392). *Robinson* quoted a series of letters[2], holding that "[n]one of these statements threatens action that could not be taken legally." *Robinson*, 876 F. Supp. at 392. "Thus, it is necessary to examine whether they threaten action which [defendant] did not intend to take." *Id.* The *Robinson* court distinguished its decision from *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22 (2d Cir. 1989), in that the language in *Pipiles* clearly stated that the item "had been referred for collection action" when the defendant had conceded that legal action was not taken for such small accounts. *Id.* at 392-93. In contrast, the language in the *Robinson* letters did "not contain[] a *clear* threat similar to that found in *Pipiles*" and the *Robinson* defendant testified that they do indeed recommend legal action depending on the individual facts and circumstances of the case. *Id.* at 393 (emphasis added). The *Robinson* court therefore granted summary judgment because the "record [was] entirely devoid of proof that [defendant] threatened to initiate a lawsuit or that it did not intend to commence a lawsuit." *Id.* To read the *Robinson* holding as requiring an "express" threat, as opposed to a clearly implied one, thus misinterprets the circumstances of the case.

The defendant cites *Wade v. Regional Credit Assoc.*, in which the Ninth Circuit held that "[i]f a letter does not contain any threatening language, it is deemed merely informative and therefore, cannot violate § 1692e(5) of the FDCPA." 87 F.3d 1098, 1099 (9th Cir. 1996)(finding no violation)). To read *Wade* as requiring expressly threatening language, however, would create

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[2]The letters warned of a "PROTRACTED AND UNPLEASANT COLLECTION EFFORT"due to the "PROBLEMS AND POSSIBLE CONSEQUENCES CONNECTED WITH NON-PAYMENT OF A LEGITIMATE DEBT." *Robinson,* 876 F. Supp. at 392.

a mere exercise in circular logic, stating that "if it doesn't threaten, it doesn't violate the prohibition against threatening," and ignores the very real possibility that some threats can be implicit.[3] The language in *Wade* merely noted that "failure to pay could adversely affect [plaintiff's] credit reputation," devoid of any threat to sue, garnish wages, or seize assets. In contrast, MDS's letter implied that it would seek any available information on practically all of debtor's assets to "determine what further collection effort to take," if the debt was not paid. The court therefore interprets *Wade* as allowing for the possibility that contents of a debt collection notice, in context, may impose a threat even when the express language does not.

MDS's reliance on the *Bieber* case is distinguishable. *Bieber v. Assoc. Collection Servs.*, 631 F. Supp. 1410, 1416 (D. Kan. 1986). The plaintiffs in *Bieber* claimed "illegal" threats based on the indication that "defendant had the authority to take legal action." *Id.* The language, however, indicated only that legal action "may be filed against you," and that legal action would be "recommended." *Id.* Legal action was, in fact recommended and the creditor sued; these were not illegal or unintended threats because they truly occurred. *Id.*

Here, MDS held on to the account for four years, and its chief operating and financial officer testified that they intended to do so indefinitely, without ever meaningfully returning the account to creditor Flowers Hospital. (Test. of Gary Ball 12:12-13:11; 22:7-9). During those four years, they never so much as ran a credit report, deeming it unprofitable to do so. (*Id.* at 22:16-20; 24:7-12; 47:15-20). Gary Ball testified that MDS had no intentions of taking legal action against the Cambrons. (*Id.* at 18:2-6; 28:18-29:10; *see also R&R* at 3 (stating that with

[3]For instance, if a debtor owed money to one of the more illegal and unsavory types of debt collectors, such as a bookie or mobster, who then sent one of his goons over to tell him, "I sure hope your automobile takes you safely home tonight," the lack of an express threat in such a statement should not prevent the debtor from considering hailing a cab.

respect to the non-time barred debt, "the evidence showed that Medical Data had no intention to take that action."); *id.* ("[MDS's] efforts to collect debts appear to consist of two things. First, it sends a letter and then it follows up with telephone calls.")). Therefore, the letter's implication that assets might be seized, possible only through legally obtaining a judgment lien, was false and misleading, since MDS had no intention of even *investigating* their assets.

MDS insists that its "letter did not contain any threats to commence legal action or that Cambron's account would be referred to an attorney if they did not pay their debts in full, unlike the letters at issue in both *Pipiles* and *National Financial Servs., Inc.*" *Obj.* at 8. This may be true, but it misses the point. MDS's comparison to several cases to show stronger language specifically threatening legal action is of only limited comparative value, since e(5) is not limited to threats of legal action specifically, but more broadly prohibits threats "to take *any* action that . . . is not intended to be taken." § 1692e(5) (emphasis added). If MDS's letter sufficiently suggests that *some* type of action will be taken against plaintiff's assets when there is no intention of taking *any* action, it makes little difference that stronger language specifically implying *legal* action was found not violative in other cases.

Finally, MDS argues that the bankruptcy court erred in relying on *Mailloux v. Arrow Financial Services,, LLC,* 204 F.R.D. 38, 41-42 (E.D.N.Y. 2001), claiming it to be distinguishable and of little merit to the case because the *Mailloux* court had found an e(5) violation in order to satisfy the typicality requirement of class certification. (*Obj.* at 2.) The bankruptcy judge cited *Mailloux* for the proposition that it violates e(5) to imply that certain action would be taken, when such action could not lawfully be taken. This would apply to the first prong of e(5). This court, however, finds it unnecessary to consider whether the first prong was violated by threatening either suit or other action on a debt as to which the statute of

limitations had run. To the extent that the Report and Recommendation would hold that either suit or collection efforts short of suit on a time-barred debt in Alabama would constitute a *per se* violation of the FDCPA, this court does not adopt it, as the court finds a violation of the second prong.

In sum, the language in MDS's debt collection letter implied that, due to plaintiff's failure to "pay this obligation in full," MDS would now begin seeking available information to determine which specific assets to go after. Contrary to MDS's attempts to paint the language in the following way, it never said: "what further collection effort, *if any*, to take." Instead, it said that it "*may* be seeking [information], *if available*, to determine what further collection effort to take." *Id.* The implications of the two phrases are quite different. Without deciding whether the former phrasing would have violated e(5) or not, it is clear that the latter phrasing, taken from the letter itself, implies that collection is certain, while the type of collection and the particular assets to be surely seized depend on the information available. This violates § 1692e(5) precisely because MDS suggested that investigation into available sources in order to locate assets would be undertaken, and that collection efforts against assets would be taken, unless the Cambrons paid the debts, when MDS had no intention of doing so. While the letter may not necessarily refer to the same kinds of legal actions that the cited cases do, it just as strongly implies what the statute plainly prohibits: "the threat to take *any* action . . . that is not intended to be taken." 15 U.S.C. § 1692e(5) (emphasis added).

This court finds from the record that the defendant's letter impliedly threatened to investigate the debtor's employment, contact others to find assets, garnish wages or seize assets, or take further collection efforts other than contacting the debtors, if they did not pay the debts, none of which it had any intention of doing. Accordingly, this court adopts the bankruptcy

judge's Recommendation to find a violation of § 1692e(5), but does so on that basis and not on the basis that the letter threatened to take action that cannot legally be taken.[4] The court makes no finding as to whether the letter threatened to take action that cannot legally be taken, it being unnecessary to do so.

C. 15 U.S.C. § 1692e(10) violation

Subsection (10) of 15 U.S.C. § 1692e prohibits "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." 15 U.S.C. § 1692e(10) (2006). MDS claims it did not violate e(10) because it did not threaten legal action. Evaluating the letter independently from any e(5) analysis, as discussed *supra*, this court finds the letter to violate e(10) as well.

As discussed in the e(5) analysis, the letter need not threaten legal action to constitute a threat under e(5); simply threatening an unintended action is sufficient. Similarly, one need not threaten anything to constitute an e(10) violation; mere deception, intentional or unintentional,

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[4]This finding by the court is consistent with the Federal Trade Commission's "Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act," 53 Fed. Reg. 50097, 50106 (December 13, 1988):

> Section 807(5) prohibits the "threat to take any action . . . that is not intended to be taken."
>
> . . . .
>
> (3). *Statement of possible action.* A debt collector may not . . . imply that he or any third party may take any action unless . . . there is a reasonable likelihood, at the time the statement is made, that such action will be taken. A debt collector may state that certain action is possible, if it is true that such action . . . is frequently taken by the collector or creditor with respect to similar debts; however, if the debt collector has reason to know there are facts that make the action unlikely in the particular case, a statement that the action was possible would be misleading.

While not binding, it has been held that the FTC's construction and interpretation of the FDCPA "should be accorded considerable weight." *Hawthorn v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1372 n.2 (11th Cir. 1998) (citing *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782-83 (1984)).

"to collect or attempt to collect any debt *or* to obtain information concerning a consumer" is sufficient to constitute a violation. § 1692e(10) (emphasis added). For purposes of argument, the court can assume, even though the letter did not ask the Cambrons to furnish any information about assets, but only asked for payment, that MDS's sole purpose in sending the letters was merely to obtain information about the Cambrons' assets in order to assess their likelihood of voluntary repayment, and consequently whether more phone calls and other non-legal actions were necessary. Their purpose is irrelevant – the language of the letter would still lead "the least sophisticated consumer" to believe that their assets were endangered due to some type of impending collection action. This deception alone constitutes a violation of e(10) under the strict liability of the FDCPA. *See Ferguson* at 1297; *Kaplan* at 1361-62; *Bentley* at 63.

MDS goes to great lengths over several pages to argue that the bankruptcy court failed to properly analyze and apply *Kimber v. Fed'l Financial Corp.*, 668 F. Supp. 1480 (M.D. Ala. 1987). *See Obj.* at 12-17. Specifically, MDS argues that the bankruptcy court improperly relied on *Kimber* for the proposition that *any* attempt to collect on time-barred debt was deceptive under the FDCPA. *Id.* It argues that *Kimber* has been clearly limited, in states such as Alabama which interpret statutes of limitation as barring judicial remedies instead of extinguishing debts, to prohibit only legal actions, and not "any and all" collection efforts. Therefore, MDS claims, "it is significant that few courts interpret *Kimber* as the bankruptcy court did in its Proposed Order as barring any and all attempts to collect upon a time-barred debt." *Obj.* at 13.

The bankruptcy court never relied on *Kimber,* but instead cited it as a *see also* cite while discussing the well-supported "least sophisticated consumer standard." *R&R* at 7. Moreover, this court finds *Kimber* to be just as unnecessary to its e(10) determination, if not more so, than

Mailloux is to its e(5) determination.[5] To the extent that MDS, or anyone else, should interpret the bankruptcy judge's Report and Recommendation to hold that any and all attempts to collect a debt in Alabama which would be barred by the statutes of limitations to be *per se* violations of the FDCPA, this court does not adopt such an interpretation, it being unnecessary to consider such issue.

Finally, MDS asserts that "the bankruptcy court expressly acknowledged there was nothing deceptive or misleading in MDS's letter." *Def's Reply* at 2. "Therefore," MDS argues, "the Bankruptcy Court [erroneously] focused on the purpose of MDS's letter, which it determined was unlawfully to coerce payment of a time-barred debt." *Id.* at 11. These two mischaracterizations take the judge's comments out of context. The bankruptcy judge did state that "[t]here is nothing in the letters that is demonstrably false." *R&R* at 4; *Def's Reply* at 11. The judge also stated that "it strains credibility to believe that the true purpose of the language in question is to obtain accurate information on a debtors' assets and wages," and that "it appears that the purpose, and surely the effect of these letters is to coerce payment by giving a false impression that the debtor's wages and assets are in jeopardy." *R&R* at 4. As the bankruptcy judge continues to explain, however, "the issue here is whether the letters in question are deceptive." *Id.* at 7. Although they may not have been "demonstrably false," the bankruptcy judge found the letters to be deceptive in their implications to the "least sophisticated consumer," and therefore a violation of § 1692e(10). No more evaluation of MDS's purpose is necessary. The statute of limitations and the proper extension of *Kimber* have nothing to do with any

[5]If this court had found that MDS had violated e(5) by making an "illegal" threat, then the proper interpretation of *Kimber* with respect to the appropriate pursuit of time-barred debt would be relevant. Because the court finds that MDS violated e(5) by making an unintended threat, however, any address of this issue would be dicta.

dispositive issues as far as this court is concerned. The FDCPA is a strict liability statute. If MDS truly intended, as it claims, merely to elicit information from the debtors about their assets in order to decide whether to make more phone calls or mail more letters, it should have been more clear and less deceptive in the way it made this request to the debtor.

IV. CONCLUSION

As to the specific objections made by the defendant, the court finds as follows:

1. As to defendant's objection to the bankruptcy judge's characterization of the letters as "demanding payment," the objection is due to be overruled. A reasonable recipient of the letter, and certainly the "least sophisticated consumer," would understand the letter to demand payment in order to avoid an investigation into the debtor's assets and employment, and collection efforts which could jeopardize either or both.

2. As to defendant's objection to the bankruptcy judge's factual finding that MDS's letters sought to deceive the Cambrons into believing that their wages and property were in jeopardy, the objection is due to be overruled, for the reasons previously discussed in this opinion.

3. Defendant's objections to the conclusions of the bankruptcy judge are overruled for the reasons previously discussed in this opinion, and as modified by the opinion.

V. ORDER

For the reasons discussed, it is hereby ORDERED as follows:

1. The Defendant's Objections to the Report and Recommendation of the bankruptcy judge are OVERRULED.

2. Pursuant to the authority granted to this court by 28 U.S.C. § 157(c)(1), the Report and Recommendation of the Bankruptcy Judge is ADOPTED as Modified by this Opinion, and damages are assessed at $1,000, plus costs and attorney's fees, for the plaintiff in each case. Judgment will be entered accordingly.

Done this 4th day of December, 2007.

/s/ W. Harold Albritton
W. HAROLD ALBRITTON, III
SENIOR UNITED STATES DISTRICT JUDGE

Medical Revenue Services
P.O. Box 1149
Sebring FL 33871

RETURN SERVICE REQUESTED
04/19/2005

med9sxA12DP0A107KE:014004

JAMES R CAMBRON
PO BOX 464
DALEVILLE AL 36322-0464

Reference
F9708100109

Toll Free Number
(800) 315-6050

Total Amount Due
$1874.59

CHECK CARD USING FOR PAYMENT
CARD NUMBER
AMOUNT | EXP. DATE
SIGNATURE

MAKE CHECK PAYABLE AND REMIT TO:
Medical Revenue Services
PO BOX 1149
SEBRING FL 33871-1149

CHECK HERE IF ADDRESS OR INSURANCE INFORMATION IS INCORRECT AND INDICATE CHANGE ON REVERSE SIDE

Page 1 of 1

DETACH HERE AND RETURN TOP PORTION WITH YOUR PAYMENT

Medical Revenue Service is a collection agency, retained to represent the below named creditor. Since you have failed to pay this obligation in full, we now must determine your ability to repay this debt. The information we may be seeking, if available, to determine what further collection effort to take is:

1.) Real estate ownership/equity
2.) Personal property assets
3.) Savings, checking balances
4.) Your source of income
5.) Automobile ownership
6.) Verification of employment

Unless you notify this office within thirty (30) days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid. If you notify this office in writing within thirty (30) days from receiving this notice, this office will: obtain verification of the debt or obtain a copy of a judgement and mail you a copy of such judgement or verification. If you request this office in writing within thirty (30) days after receiving this notice, this office will provide you with the name and address of the original creditor, if different from the current creditor.

Please make your check or money order payable to Medical Revenue Service. In order to assure proper credit to your account, include the reference number with your payment. We also accept "check by telephone" for your convenience. If you have any questions, you may contact an account representative at the above listed phone number.

Pursuant to Section 807(11) FDCPA, this communication is from a debt collector and is an attempt to collect a debt. Any further information obtained will be used for that purpose.

A. U. Clancy
Collection Department

AUC/tb

Account #	Client Name	Service Date	Balance	Patient Name
F9708500163	Flowers Hospital	03/26/1997	307.88	Lehr, Timmy J
F9708100109	Flowers Hospital	03/22/1997	1386.55	Lehr, Timmy J
F0307000545	Flowers Hospital	03/13/2003	58.77	Cambron, James R
F0402500112	Flowers Hospital	01/25/2004	55.74	Cambron, James R
F0402400129	Flowers Hospital	01/24/2004	65.65	Cambron, James R
		TOTAL BALANCE: $1874.59		

PLAINTIFF'S EXHIBIT A

PL1

Medical Revenue Services
P.O. Box 1149
Sebring FL 33871

RETURN SERVICE REQUESTED
05/24/2005

WENDY L CAMBRON
PO BOX 464
DALEVILLE AL 36322-0464

Reference
F0323900637

Total Amount Due
$175.00

Toll Free Number
(800) 315-8050

CHECK CARD USING FOR PAYMENT
CARD NUMBER
AMOUNT | EXP. DATE
SIGNATURE
MAKE CHECK PAYABLE AND REMIT TO:

Medical Revenue Services
PO BOX 1149
SEBRING FL 33871-1149

CHECK HERE IF ADDRESS OR INSURANCE INFORMATION IS INCORRECT AND INDICATE CHANGE ON REVERSE SIDE

Page 1 of 1
DETACH HERE AND RETURN TOP PORTION WITH YOUR PAYMENT

Medical Revenue Service is a collection agency, retained to represent the below named creditor. Since you have failed to pay this obligation in full, we now must determine your ability to repay this debt. The information we may be seeking, if available, to determine what further collection effort to take is:

1.) Real estate ownership/equity
2.) Personal property assets
3.) Savings, checking balances
4.) Your source of income
5.) Automobile ownership
6.) Verification of employment

Unless you notify this office within thirty (30) days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid. If you notify this office in writing within thirty (30) days from receiving this notice, this office will: obtain verification of the debt or obtain a copy of a judgement and mail you a copy of such judgement or verification. If you request this office in writing within thirty (30) days after receiving this notice, this office will provide you with the name and address of the original creditor, if different from the current creditor.

Please make your check or money order payable to Medical Revenue Service. In order to assure proper credit to your account, include the reference number with your payment. We also accept "check by telephone" for your convenience. If you have any questions, you may contact an account representative at the above listed phone number.

Pursuant to Section 807(11) FDCPA, this communication is from a debt collector and is an attempt to collect a debt. Any further information obtained will be used for that purpose.

A. U. Clancy
Collection Department

AUC/lb

Account #	Client Name	Service Date	Balance	Patient Name
F0323900637	Flowers Hospital	08/27/2003	175.00	Cambron, Wendy L

TOTAL BALANCE: $175.00

.10
.00
75
150
1-8

PLAINTIFF'S EXHIBIT 12

PL1